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MONTANA SUPREME COURT

GENDER FAIRNESS TASK FORCE

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FINAL REPORT

Findings and Recommendations

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ACKNOWLEDGMENTS

The Gender Fairness Task Force extends its grateful appreciation to the State Bar of Montana for its unceasing support of the goals of Task Force. When progress toward accomplishing Task Force goals was painfully slow, the Task Force could always rely on the State Bar's patience and encouragement. Particularly helpful were George Bousliman, Executive Director, and State Bar Board of Trustee Ed Bartlett, the liaison to the Task Force and now President-Elect of the State Bar.

The Task Force also gratefully acknowledges the many citizens of Montana who participated in the regional public hearings. It is, after all, citizens participating in the court system who feel the impact of gender inequity. We are indebted to them for their collaboration in this effort.

Most particularly, as Chair, I am deeply indebted to Sarah Arnott Ozment, Janice Doggett, Justice Karla Gray and Judge Marge Johnson – the Chairs and writers of the Subcommittee Reports. Without their unwavering support, hard work and persistence, this report would never have been completed.

Klaus D. Sitte, Chair

PREFACE

This report has been awaited a long time -- by the members of the Task Force, the bar, the public and, of course, the Montana Supreme Court. The Task Force had considerable difficulty maintaining cohesion and momentum in the lengthy process of study, gathering and assembling information, holding hearings and listening sessions and, ultimately, writing its findings. On the other hand, the slowness of the Task Force is decidedly not attributable to a lack of commitment to the issue or any disagreement about the conclusions and recommendations. Subcommittee chairs, past and present chairs often felt like pushing from behind rather than pulling from the front. Regardless of the delays often caused by the committee method of deliberation, the report is no less timely today than when the process began. Indeed, some Task Force members would urge that the Findings and Recommendations are more cogent now than ever. For those who have awaited this Report and exercised extraordinary patience, please accept the gratitude of the Task Force for your perseverance and encouragement. We trust the Report was worth the wait.

Klaus D. Sitte, Chair

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REACHING TOWARD GENDER EQUALITY

INTRODUCTION

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness –
Declaration of Independence

Each year, thousands of Montana citizens use the judicial system to resolve disputes which cannot be decided by other appropriate means. Litigants justifiably expect court actions and decisions to be free from partiality, prejudice and bias. Judges, attorneys and court personnel, and even the law itself, must be trusted to render determinations without regard to outside influences.

An essential element of a trustworthy justice system lies in its ability to be fair. As a cornerstone, fairness cannot exist where decisions are influenced by the participants' race, color, religious beliefs, age or gender. For whatever cause, wherever and whenever it exists, bias affects the quality of justice received by the participants. The particular focus of this Task Force was, of course, to determine whether a person's gender, above all other form of prejudice, is involved in improperly

influencing behavior and outcome in Montana's courts. The presence of bias seriously erodes the ability of Montanans to expect and receive equality in the courts.¹

The Montana Supreme Court created the Gender Fairness Task Force in 1990. The Court charged the Task Force with the responsibility to "[e]xamine the extent to which

¹ Similarly, see Final Report, Gender Bias Task Force of Texas, State Bar of Texas, February, 1994, p. 13:

When gender bias is present, and the policies, practices and rules of the courts are applied in a discriminatory manner, the ability of Texas citizens to expect and obtain fair and equitable treatment is seriously compromised.

gender bias, if it exists, affects decision making in the courts of Montana . . . " and "[i]f gender bias exists, recommend means to eliminate its effect in the Montana judicial system.."² Ten years later, the Task Force has now completed its work and provides this report to the Court toward fulfillment of that ongoing obligation. The timing of the report, at the approach of the new millennium, is most appropriate.

THE MANDATE

What is it the Task Force should examine? What are the distinguishing characteristics of gender bias? What does gender bias look like? What is gender bias? Fortunately, Montana's Task Force could draw upon many reports, studies, surveys and investigations from other states to centralize its focus and mission. Indeed, Montana is was among the last states to investigate gender fairness.

One study defined gender bias as any action which interfered with impartial judgment, existing when decisions are based upon preconceived notions about the roles and abilities of men and women.³ Often, such prejudices derive from myths and misconceptions about the economic and social realities in men and women's lives.⁴ A lack of knowledge is a contributing factor to gender bias and often requires no deliberate intent.⁵ On the other hand, patronizing conduct, comments or behavior can foster demeaning attitudes, despite no ill intent.⁶

The Task Force was formed after the State Bar's Gender Fairness Steering Committee petitioned the Court to create the Task Force "with such responsibilities and

² See Appendix A for a copy of the complete text of the Montana Supreme Court's Order creating the Task Force.

³ "Gender Bias in the Legal Profession — Breaking the Glass Ceiling." Washington Women Lawyers and Washington State Supreme Court's Gender and Justice Implementation Committee, Seminar Materials, 1992, page 3.

⁴ Gender Bias Study of the Court System in Massachusetts, Supreme Judicial Court, 1989, p. 14.

⁵ Lynn Hecht Schafran, Promoting Gender Fairness through Judicial Education: A Guide to the Issues and Resources, published by the Women Judges' Fund for Justice, 1989, p. 1.

⁶ In response to a description by one Montana Gender Fairness Task Force member of behavior intended to be "gentlemanly," another Task Force member responded, "We just don't get it, do we?"

powers as are necessary to accomplish [it's] goals . . . "⁷ to consider gender bias issues in Montana. The Steering Committee made this plea following a series of investigatory hearings in which numerous reports of gender inequity were related to the Committee. The Court then appointed 18 people, from various professions and interests to serve on the Task Force. Included in the membership were judges, public and private sector attorneys, academics, and interested citizenry.⁸

As its first responsibility, the Task Force membership determined that a survey of lawyers actively practicing in Montana was essential to any inquiry regarding the presence, or absence, of gender bias. While there have been numerous studies conducted on gender bias and its influence on court systems⁹, it seemed equally prejudicial to the Task Force to simply presume such bias existed in Montana without empirical evidence to support that assumption.

The Task Force received no public funding and no taxpayer money was used for Task Force work. Since no taxpayer funds were used to underwrite the costs of the survey, the Task Force set about to raise money to conduct such a survey.¹⁰ A gender fairness survey of five hundred randomly selected State Bar members resulted in mounds of data. Survey results are still in need of being tabulated, correlated and analyzed to this day but substantial information is available.¹¹

The Task Force held regional public hearings throughout Montana, soliciting input from the general public about gender fairness issues. Public Hearings were held in Missoula, Helena, Billings, Great Falls. Smaller "satellite" hearings or listening sessions were held in Miles City and Glendive.¹² Task Force members universally felt that more

⁷ Petition of the State Bar of Montana, Cause No. 90231, filed in May, 1990, by Gary Spaeth, State Bar President.

⁸ See a complete list of the original Task Force membership attached as Exhibit B.

⁹ See comments in the Effects of Gender in the Federal Courts, Final Report of the Ninth Circuit Gender Bias Task Force, July 1993, page 1.

¹⁰ The Task Force is most grateful to the generous contribution of the Arco Foundation toward the costs of the survey. In addition, the Women's Law Section of the State Bar of Montana also contributed significantly toward the survey costs.

¹¹ The results and tables, as tabulated by the BBER are attached as Exhibit C. .

¹² Serendipitously, the Career Development Program of Miles Community College was also conducting its own Judicial Gender Bias Survey. While not a true scientific survey, the responses were (continued....)

hearings could be conducted but that a sufficient and consistent foundation of information was received, warranting closure.

The Task Force membership was divided into three subcommittees to examine the survey results and review the anecdotal information received through the public hearings. These subcommittees were

- Gender Bias in Courthouse Interactions Subcommittee;
- Gender Bias in Family Law Subcommittee; and
- Gender Bias in the Legal System Subcommittee.

Each subcommittee then set about the task of reviewing all available material from hundreds of resources to derive findings and recommendations to the Montana Supreme Court. Among the resources were the numerous reports, findings and investigations for similar task forces, commission or committees from many other states.

THE SURVEY

The Task Force chose to use a gender fairness survey as one method to determine whether gender bias was present in the Montana Court system. Task Force members were unanimous that the presence, if any, of gender bias must be verified before moving forward. After all, if no gender fairness issues existed, no further action by the Task Force was necessary. Using sample surveys from other states, Task Force members edited and drafted questions with the expert advice and assistance of the University of Montana Bureau of Business and Economic Research (BBER).¹³ Task Force members bargained, pleaded and cajoled each other about which questions to include in

¹² (...continued)
helpful in analyzing the public comments.

¹³ The Task Force wishes to acknowledge especially the work and counsel of Susan Walwork at BBER for her dedication to the work of the Task Force.

the survey. Limited funding prohibited more detailed survey questions. Eventually, consensus produced a reliable survey instrument.

The survey questionnaire was designed to provide accurate, reliable and informative data to the Task Force. The questionnaire was intended to gather details regarding the day-to-day operation of the Montana court system. The survey sampled 250 men and 250 women, randomly selected from the membership of the State Bar of Montana. Of the surveys sent, 97 men (38%) and 140 (56%) women attorneys responded to the survey. In addition to demographic data, the survey asked for information in five broad areas of practice.¹⁴ The areas of inquiry included the following:

- ▶ Interaction in Court, in Chambers and Elsewhere;
- ▶ Civil Damage Awards;
- ▶ Family Law;
- ▶ Domestic Violence between Adults; and
- ▶ Criminal Sexual Conduct.

These areas were chosen for a variety of reasons. Other surveys conducted elsewhere had already tested these areas. Montana was not "starting from scratch." More than other practice areas, these selections would most readily suggest whether gender bias was present in the view of the survey participants.

The survey, entitled "Legal Practice and the Montana Judicial System — A Survey of Montana Attorneys," was mailed to the randomly selected State Bar membership in early 1994. In his cover letter to the survey, Chief Justice Turnage wrote:

The work of the Task Force is vitally important to our judicial system, and your knowledge and experience as a participant in the judicial process is critical to the success of its mission.

BBER tabulated the results and provided the Summary Tables to the Task Force in July of 1995.

¹⁴ Task Force members universally wished to inquire into more practice areas; both time and insufficient financial resources limited the study.

The results of the survey were remarkably illuminating. The written commentary was startling and revealing, sometimes shocking.¹⁵ Not surprisingly, much of the anecdotal information gathered by the State Bar's President's Commission on Women in the Profession was qualitatively confirmed by the survey results.¹⁶ The written commentary was consistent and, surprisingly, not redundant.

The disparity of responses between men and women is most telling. Clearly, the perception of women respondents is that gender bias exists to a much greater extent than the men respondents believe. More importantly, the negative impact of what is perceived is more significant to women attorneys. For example, attorneys were queried regarding interactions in court and in chambers. Questionable conduct included male attorneys addressing female attorneys in a less formal manner in court and in off-the-record discussions, as well as addressing women litigants in a less formal manner. By a more than two to one margin, women attorneys felt that, when the described activity occurred, such activity can adversely affect the outcome of a case.¹⁷

When male counsel or court employees make suggestive remarks and engage in obviously inappropriate behavior, women respondents felt that such activity places a special burden on them.¹⁸ Nearly a third of the women respondents were aware of male counsel making derogatory or demeaning remarks about female counsel in less formal professional settings on a frequent or more regular basis.¹⁹ When male attorneys cut off or ignore female counsel arguments or comments, the response was even more dramatic. By a three to one margin, women attorneys perceived a special burden being placed upon them, as opposed to their male counterparts.²⁰

¹⁵ To the extent possible, any identifying characteristics from any respondents' commentary has been removed in this Report.

¹⁶ See Final Report, President's Commission on Women in the Profession, July, 1994, pp. 14-33.

¹⁷ See Table D.1, Survey of Montana Attorneys, Preliminary Data, p. 6.

¹⁸ See Table D.3, Survey of Montana Attorneys, Preliminary Data, p. 8.

¹⁹ See Table D.4, Survey of Montana Attorneys, Preliminary Data, p. 9.

²⁰ See Table D.5, Survey of Montana Attorneys, Preliminary Data, p. 10.

Women attorneys were twice as likely to include comments in addition to answering the survey questions.²¹ Of the men supplying comments, several were openly belligerent to the survey:

If State Bar dollars are used to fund this survey,
I protest the waste of my money!²²

Yet another added:

My opinion is that this survey is: A) a waste of scarce time, money and human resources; B) not likely to reflect the true state of gender bias; C) the product of an overreaction; and D) all of the above.

At least one male respondent was quite blunt to women attorneys:

There should be NO women attorneys. They do their clients a disservice because of their lack of analytical skills and ability to negotiate. I have never heard a positive comment from another attorney when dealing with women.

Another, while not as disparaging, felt the idea of investigating gender bias was politically motivated:

There are a handful of female attorneys with a political agenda and with large chips on their shoulders that appear to be most interested in misrepresenting the nature and extent of gender bias in the judicial system as I have experienced it. My experience is that there is little gender bias in the system, and to the extent there is, it is at a client level and is warranted based on the difference between males and females.

Another agreed, claiming gender bias is unimportant:

²¹ Comments and anecdotes were supplied by 79 women respondents as compared to 38 men respondents.

²² No State Bar of Montana money was used to fund the survey.

I honestly believe that the entire gender bias is essentially a non-issue . . . I do not deny there was a great deal of gender bias expressed at the turn of the century when it was absolutely unheard of for women to be an attorney. However, at the same time, it was unheard of for a woman to be working in an office as a secretary, let alone in a business environment.²³

Most men who submitted comments, however, were not as spiteful. Several, in fact, said they had seen no evidence of gender bias at all:

In my practice, I have not seen female attorneys treated poorly or with disrespect because of their gender.

As my answers reflect, I have not seen or been aware of women attorneys being abused in professional or court settings.

I have seen no gender bias at any level or in any court proceeding except one out-of-state federal judge and it was anti-male.

In close to fifteen years of practice, I have seen very little gender bias in the legal profession . . . I rarely observe obnoxious behavior based on gender.

Several women respondents provided similar comments:

Generally I have not felt I have been discriminated against.

My gender has been no impediment.

As an active woman attorney, I have found that my own attitude usually controls the attitude of those I work with professionally,

²³ The respondent here was 48 years old.

I have never experienced any gender-based (or other kind, for that matter) mistreatment or lack of respect in any state, local or federal courts in which I have practiced.

Statistical analysis of the survey demonstrates that, in general, men attorneys in Montana do not observe gender bias but many women attorneys do.²⁴ Significantly, the perceptions of women respondents were markedly different from that of men:

I wish things were better, but in my *** years they seem to have gotten worse.

Things haven't changed a whole lot in the last two decades. Women are routinely subject to sexual harassment and/or intimidation, in the legal profession and in the culture at large.

I think there is a great deal of subtle sexism among male attorneys against female attorneys.

In my *** years of active practice of law, I have become convinced that gender bias exists.

While overt sex discrimination is not as prevalent any more, attitudes of gender bias still are.

The overt signs of sex bias are mostly (not totally) gone. But I would say that most males still retain the essential attitude of gender bias.

In the *** years I have been practicing, it seems as though gender bias has become less blatant, more subtle. It hasn't lessened any; it's just harder to tell a subtle incident than it is to tell a blatant incident. It's not getting any better.

²⁴ See Tables D.1 through D.7, Survey of Montana Attorneys, Preliminary Data, pp. 5 through 12. More recently, Dori Nelson a statistician for the Office of Public Instruction, completed a more in-depth analysis. That assessment is found in Appendix B.

Women respondents presented glaring examples of what they perceived as gender bias. Examples ranged from inadvertent "good ole boy" comments to unwanted touching. One woman recalled statements made to her during an interview:

I was shocked when, at the end of the interview, one attorney said, "You do understand that we may not hire anyone now because all of the applicants were women."

Another remarked on the differences between work assigned to men and women attorneys:

I have been assigned to read documents solely, even though I graduated at the top of my law school class and I have been in practice *** years; men are invited to strategy sessions.

Still another commented on the treatment she received in court from a judge:

One district court judge told me I better consult with my male law partner; the judge disagreed with the position I took in a case,

The disparity of treatment between men and women attorneys received frequent mention:

The women in our office have been referred to as "cupcake" or "muffin." A partner in my firm stated about a temporary secretary, that he would like to see her "naked on a palomino."

The men in this office ridicule the women, tell sexist jokes, and call women derogatory and cruel names.

I have also experienced incidents where judges and hearing officers have patted me on the head, rubbed my shoulder in the elevator, referred to me as "kiddo" and winked at me during law and motion.

Perhaps one woman attorney's observations summed it up best, concerning inadvertent, unwanted remarks:

Overt degrading and insulting remarks to and about women attorneys are tolerated within the office and social settings with the attitude that it's "just kidding" and women who are offended are hypersensitive and not "good sports."

It would be inappropriate, however, merely to attribute these perceptions to the differences between men and women. It would be even more erroneous to blame hypersensitivity or political agenda for the dramatic differences in perception. The federal Ninth Circuit Final Report concluded:

...the problems of gender bias cannot and should not be dismissed as only ones of differing perspectives, accompanied by a "vive la difference."²⁵

More than 50% of the survey respondents, women **and** men alike, expressed the opinion that judges and attorneys accorded women attorneys less credibility.²⁶ More than a third indicated that judges and attorneys accorded less credibility to women experts.²⁷ And 47% of all respondents felt such conduct is a form of gender bias which can adversely affect the outcome of a case.²⁸

PUBLIC HEARINGS

The Task Force held public hearings in 1995 and 1996 to gather information from the public. Some hearings were well-attended, while others had more Task Force members than public participants. Nevertheless, the amount of anecdotal

²⁵ Final Report, Ninth Circuit Gender Bias Task Force, Executive Summary: The Effects of Gender in Federal Courts, July 1993, p. 19.

²⁶ Survey of Montana Attorneys, Table D.1: Response to question D2.

²⁷ Survey of Montana Attorneys, Table D.1: Response to question D1.

²⁸ Survey of Montana Attorneys, Table D.1, page 6.

information collected was substantial.²⁹ Participants were limited to brief testimony concerning court experiences where gender bias appeared to be an issue. Participants were encouraged to provide the Task Force with written testimony, if open public comment was difficult or imprudent. Many items of written material were received and considered in writing this report.

Significantly, the public comments focused frequently on various aspects of family law. In this area of legal practice, more than any other, the two sexes directly oppose each other. The public perception of fairness, or the lack of it, in the judicial system is most dramatic in family law cases.

The public hearing commentary was remarkably consistent with survey results and related material. Lynn Hecht Schafran, Director of the National Judicial Education Program, reported in the *Family Advocate*:

The gender bias rife in family law is documented in a series of reports by task forces appointed by state chief justices to determine the nature and extent of gender bias in their own court systems and to recommend and implement reforms.

The task forces consistently report that gender bias is particularly prevalent in family law and adversely affects women and men in various ways; on the whole, gender bias in the judicial system affects women more than men.³⁰

NEXT STEPS

The unanimous opinion of the Gender Fairness Task Force is that gender bias does indeed exist in the Montana court system. The mounds of evidence gathered by the Task Force leads inextricably to that conclusion. The survey results, the

²⁹ A Minnesota Task Force member is credited with saying, "When you're up to your neck in anecdotes, they begin to take on statistical significance."

³⁰ Lynn Hecht Schafran, "Gender Bias in Family Courts," *Family Advocate*, Summer 1994, pp. 22-23.

regional public hearings listening session testimony, and the written comments received by the Task Force serve as a compass toward that rather simple deduction. While attorneys, judges, court personnel and litigants differ to the extent of the problem, there can be no doubt as to its presence. And why should Montana be any different? Every other state with a gender fairness task force has reached the same conclusion. It would be misguided to pretend gender bias does not affect this state's court system.

The Task Force recognizes that the influence of gender in the legal system is inherently a subjective matter. Those who engage in gender biased behavior are rarely willing to admit it; those affected by it rarely have clear evidence. Surveys, reports, and hearings rely fundamentally on the perception of the person providing the information. However, when a substantial number of attorneys, both men and women, perceive negative consequences based on gender, those perceptions become significant. No amount of denial or minimizing by nay-sayers can abolish perceptions so widely shared – especially when the perceptions are shared by men and women alike. Overall, a significant number of survey respondents believe that certain types of conduct could adversely affect case outcome.³¹ Even ardent critics of any gender bias investigation should recognize the absurdity of ignoring the impressions of so many survey respondents.

It is also the unanimous opinion of the Gender Fairness Task Force that the effects of gender bias can be minimized. If the problem had no solution, the mission of the Task Force would be onerous indeed. The Findings and Recommendations included in this report are based on the proposition that bias is learned behavior. Whether bias and prejudice is based on race, religion, gender or any other factor, the result is learned behavior. Ultimately, to remove gender bias from the courts, all participants in Montana's court system must learn new behavior.

The legal profession has regularly adjusted to change with only a murmur of protest. Lawyers have moved from personal dictation to dictating machines to personal computers in less than two decades. Lawyers, judges, and court professionals are regularly called upon to work with new rules. Most members of the bar have accommodated changes in rules of procedure, in rules of evidence and in many substantive areas of practice. In some areas of practice, wholesale changes have occurred; yet the legal profession has often taken these changes in stride, barely tripping over the new obstacles. While the adjustments are not always painless, making the changes can indeed be done.

All court players are able to learn new rules to make Montana's courts as free of gender bias as possible. Montana's court system has distinctive characteristics which can aid in minimizing the effects of gender bias. Some members of the profession will

³¹ See, for example, the responses summarized in Tables D.1 and D.2.

obviously need more guidance than others. The relatively small number of attorneys, judges and court personnel make Montana a unique place to demonstrate a deep commitment to equal justice. With the leadership of the Montana Supreme Court and the support of the State Bar, the Gender Fairness Task Force is convinced that the Montana court system can reach gender equality. The implementation of the Task Force's Recommendations is a first step toward reaching for gender equality.

The Task Force considered whether to include the long list of bibliographical material consulted by Task Force members. For brevity's sake, the list is not included. Through the kindness of Prof Fritz Snyder at the University of Montana Law School library, the material gathered will be archived in the library as the material continues to accumulate. Those wishing to consult the volumes of information available are welcome to do so.

GENDER BIAS IN FAMILY LAW SUBCOMMITTEE REPORT

The individual woman is required a thousand times a day to choose either to accept her appointed role and thereby rescue her good disposition out of the wreckage of self-respect, or else follow an independent line of behavior and rescue her self-respect out of the wreckage of her good disposition.

Jeannette Rankin as quoted in Hanna Josephson's biography, *Jeannette Rankin, First Lady in Congress*, 1974.

Family law is the only area studied by the Task Force in which opposing parties are necessarily of a different gender. When Montanans encounter the judicial system, it is most typically in the family law area. From that contact, the litigants form their impressions of the Montana legal system. As a consequence, litigants could view an adverse decision on any issue to be caused by gender bias. The Task Force thought it important to concentrate on allegations which were most frequently raised, or could be objectively found, whether by Task Force experience, existing statutory or case law or by anecdotal evidence.

PARENTING

Recognition of the Primary Parent

Subcommittee members feel strongly that decisions about parenting recognize the role of the person who has been the primary parent. Despite the changes in the family law provisions adopted by the 1997 Legislature, continuity and stability of care remain significant factors to be weighed in the child's best interests.³² M.C.A. §40-4-212(1)(h). When one parent has fulfilled the role of primary parent, but primary parenting is awarded

³² The 1997 Montana Legislature revised all family law regarding custody. The word custody was replaced with the word parenting. Parents are, as a result, no longer awarded custody. Rather, the parents either devise a parenting plan between themselves or the court ultimately orders a parenting plan to be implemented.

to the other parent, the Court should have solid, concrete reasons for making any change. The Task Force heard many comments that judges seemed to ignore who had played what role during the marriage. Regardless of the accuracy of those observations, the perception exists in significant numbers.

The issues raised at the Task Force listening sessions and hearings were broad and far-ranging in the family law area. Both fathers and mothers claimed to be victims of gender bias in the courts. Both men and women felt ignored and disregarded when evidence of their parenting was presented. Discussions at hearings and listening sessions raised cases of a father, who was an equal or primary parent, being granted no parenting status, and only infrequent contact with a child or children. At the same time, the Task Force heard from mothers whose role as the primary caregiver was totally discounted.

The most frequent complaint was that judges were simply not listening or would listen only grudgingly. When they did listen, they would frequently be rude or downright angry for being imposed upon to hear parenting [formerly, custody] matters. Often, judges would lecture litigants as if they were children, or worse, as criminals. Lawyers too told of judges who chastised them with a "not in my courtroom" attitude, but what was expected was never clarified. Some judges, both litigants and lawyers asserted, gave the distinct impression that ruling on parenting cases was beneath their dignity.

Addressing the gender issues at the outset of a parenting case may be the best way the District Court can avoid the accusation of gender bias. Because of the nature of the dispute, judges need to be most attentive to the gender bias issues and consider additional education on gender fairness issues.

FAILURE TO ADDRESS THE ISSUE OF PHYSICAL ABUSE IN PARENTING DECISIONS

When developing a parenting plan, the court must consider the physical abuse or threat of physical abuse by one parent against the other parent or the child. M.C.A. §40-4-212. There was much discussion, by attorneys and victims of domestic violence, about the negative effects family violence has upon children. Such children are fearful for the safety of the battered parent, fearful for their own safety, and may feel guilty for their inability to prevent the battering. The effect of failing to consider this issue appropriately can place children at risk to be the objects of more violence, and/or, learning to be violent from viewing the behavior. Failure to take the allegations seriously has perpetuated the myth that abuse allegations are made only to gain advantage in litigation.

Despite the negative effects of domestic violence upon children, and despite legislation mandating its consideration, district courts are perceived as failing to factor that element into parenting decisions. Only 18% of attorneys answering the Survey of Montana Lawyers said that judges "almost always" take into account the father's violence against the mother, when such violence is present. An even lower number, 7%, thought that judges "almost always" took into account a mother's violence against the father.

Because the predominant number of battered parents are women, failure to address battering, when making parenting decisions, may constitute gender bias. District court judges would benefit from training about the negative effect of parent battering upon children and the importance of its consideration when making parenting decisions. Task Force members would urge judges, lawyers, court personnel and others involved with the judicial system to learn more about domestic violence.

GENDER BIAS BASED UPON TRADITIONAL IDEAS ABOUT PARENTS' ROLES

The account of one woman illustrates how stereotypical thinking can result in gender bias: In her dissolution hearing, the judge asked her husband these three questions: (1) did the wife keep the house clean, (2) were the children clean, and (3) were meals on time? If those questions could be answered positively about the wife, did that mean she was an unqualifiedly good parent? Or did it mean the husband had no chance of being a primary parent? Such conduct by judges merely perpetuates gender bias accusations. It is axiomatic that traditional gender roles should not form the basis of parenting decisions.

Montana is not alone in noting the pervasive nature of gender stereotypes. Other states too have also found that custody determinations can be influenced by gender biased stereotypes disadvantageous to both men and women. "Achieving Equal Justice," Utah Report at S-8. Minnesota Report at pp. 23-26.

SUPPORT

The Failure of the Courts to Order Necessary Support

Inadequate child support amounts and the unenforceable child support orders have had the substantial negative effect upon women and children for many years. The Report by the New York Judicial Committee on Women in the Courts, May 1996, pp. 20-22 refers to the "compelling evidence of human suffering" caused by the failure of courts to impose

and enforce child support obligations. Much consternation was expressed at hearings and listening sessions about child support. Some women stated that they had simply given up attempting to collect support, despite Montana's Child Support Enforcement Division efforts. Failure to grant support adequate child support levels may be the most prevalent form of gender bias in the judicial system.

Montana has adopted child support guidelines which determine fair support which would, in most cases, provide adequate support for most families. Exceptions are permitted and variances allowed. A court may find the guidelines to be unjust or inappropriate, may award a lesser amount when parents have agreed, or may order that a parent has no duty to support. M.C.A. 40-6-116. When the amount ordered for support differs from the guidelines, the court must state the amount of support due under the guidelines and the reasons for the deviation.

Judicial attitude toward the guidelines across the state is significant and varies greatly. Some judges seem never to deviate from the guidelines, while others do so routinely. Predictability from one judicial district to another is difficult at best.

The Task Force believes that downward deviations from the guidelines should be made sparingly. Courts should be cautious when making determinations of less than the amount dictated by the guidelines. A parent may agree to a less than necessary amount of support, even though she statistically earns less money than her male counterpart, because of fear, or because of a desire to "get out" of a physically or emotionally abusive relationship. When judges are presented support agreements varying from the guidelines, even more thorough scrutiny is required, since judges are not bound by such agreements. To do otherwise perpetuates this genuine and long-standing form of gender bias which has relegated a large population of women and children to poverty.

Child Support from the Date of Filing

Although Montana case law allows the district court to order support from the date of a dissolution filing, or even the date of separation, attorneys report such a request is rarely granted. As noted in the Report of the Select Committee on Gender Equity of the Maryland Judiciary and the Maryland State Bar Association, pp. 12 and 13, when temporary support has been requested and not granted, the result "discriminates against women because, as custodial parents in the majority of cases, they are left to provide for the child alone out of their own resources during the prehearing period. The prehearing period often leaves the custodial mother in debt." Legislation, which requires the payment of support at least from the date of the dissolution filing, should be considered.

Child Support Beyond Age 18

Montana law permits the district judge to order support from either or both parents owing a duty of support of the child. Support continues until the child is emancipated or the child graduates from high school, which ever is later, but not beyond age 19. In Maryland, where existing law ended a noncustodial parent's duty of support at age eighteen, the Select Committee on Gender Equality supported legislation to extend child support beyond age 18 if the child was still in high school. The Report of the Maryland Select Committee on Gender Equality, October 1992, noted that a child who is 18, but still in high school, is usually given support by the custodial parent at a critical time in that child's education. Montana's current statutes have relieved, at least in part, the problems still faced by other states.

Use of Contempt Proceedings to Collect Support

Of those answering the Survey of Montana Attorneys, thirty seven percent said judges were rarely, never, or only sometimes willing to exercise civil contempt powers to enforce child support orders. (Thirty eight percent were undecided.) Enforcement of child support orders is a critical need to balance gender inequities in the view of the Task Force. Judges should consider making better use of civil contempt powers to enforce support judgments.

Judicial Attitude Toward Support and Support Enforcement

Those in attendance at hearings and listening sessions spoke often about the disinclination of district Judges to hear support cases. One attorney reported a judge as having said, regarding a support mediation in an adjoining room, that over an hour of mediation was too long because the support matter involved so little money. To the mother, however, who had resorted to food stamps to feed the family, what appeared to the judge to be a small amount of money would make a critical difference to her and her children, remarked the attorney.

According to the comments, enforcement of support in the courts was usually not pursued, because parents who are not receiving support can rarely afford an attorney. Courts are allowed, after considering the financial resources of both parties, to order a party to pay the reasonable costs and attorney fees in dissolution proceedings and proceedings to enforce dissolution orders. M.C.A. 40-4-110. There is a perception that power is not being exercised in a manner which allows for collection of support. In the Survey of Montana Attorneys, forty-three percent of those answering said attorney fees were rarely, never, or only sometimes high enough to allow the economically dependent spouse to pursue dissolution-related litigation.

Several solutions are possible. More *pro bono* programs can and will help, of course. Courts can be instrumental in providing a leadership role to encourage greater *pro bono* participation. State Bar and judicially sponsored programs are readily available and replicable in many Montana locations. Courts should be more open to awarding attorney fees in these cases, remembering that a general failure to do so has made it difficult for low income litigants – usually women – to enforce unpaid support. This failure may contribute to both the reality and perception of gender bias in the Courts.

Another solution would be to implement an expedited self-help support enforcement proceeding, similar to the present order of protection and hearing procedures available to battered spouses and partners. In those proceedings, the parties are not usually represented by counsel. Such a system would also be useful and expedient in support enforcement proceedings.

Another solution may be a family court system designed to be more “user friendly.” The Task Force is mindful that an additional layer of a judicial system may be costly to the state budget. Overall, however, the cost of the current system may be unreachable for many participants. See also *A Family Court System, infra*.

VISITATION

There was much discussion at hearings and listening sessions about visitation. In general, fathers felt that their visitation was inadequate while mothers claimed the visitation was an opportunity for conflict between the parents. Visitation every other weekend is very common, according to attorneys. Under the revised Montana family law statutes, visitation has been replaced by parenting. The Task Force hopes that parenting plans can be used to create more equitable contact between parent and child, regardless of gender. However, the results of the legislative changes upon actual parenting time remains unclear at present.

Some judicial districts, as part of local court rules, have adopted very complete and useful visitation [now parenting] guidelines. While visitation guidelines certainly help participants in the judicial system anticipate possible outcomes, not all guidelines have been revised to incorporate new parenting changes. Uniformity between various Montana judicial districts is lacking. Methods for creating consistency should be explored.

CRIMINAL ACTIONS TO ENFORCE SUPPORT

Comments by participants, including attorneys, highlighted that criminal actions for nonpayment of support does indeed occur, but not for failure to allow visitation. Whether this is a form of gender bias is unclear, since there are practical reasons for criminal nonsupport actions, *i.e.*, the ease of ascertaining whether support has been paid, and in what amount, particularly when records are being kept in the office of the Clerk of Court or by Child Support Enforcement. But the perception among visiting parents is that the result is unfair and demonstrates gender bias, since most visiting parents are fathers. Parenting plans, as opposed to visitation times, may alleviate some of these issues. Whether this is true will require future study.

THE ROLE OF THE GUARDIAN AD LITEM & PSYCHOLOGIST IN GENDER BIAS

The Task Force heard much about the tendency of district court judges to avoid direct decision-making in custody cases, relying instead on guardians ad litem and psychologist to make custody determinations. Attorneys commented it will do no good for judges to eliminate gender bias from judicial parenting decisions, if judges accept, with little question, the recommendation of a guardian ad litem or psychologist whose report or recommendation is influenced by gender bias. All persons involved in parenting determinations need to be schooled in gender bias issues. Judges need to be alert for indications of gender bias in "out-sourced" recommendations; such awareness can occur only through training.

PROPERTY

There is ample data elsewhere demonstrating that men do financially better following a divorce, while women do financially worse. Women earn statistically less than men. Children more often follow women after a divorce, and support is frequently insufficient to maintain the lifestyle women and children had prior to a dissolution. Unfair or inequitable disparities in the settlement of marital property may be a root cause.

SETTLEMENT AGREEMENTS AND GENDER BIAS

Montana law provides that the terms of a separation agreement are binding upon the court unless the court finds the agreement to be unconscionable. M.C.A. §40-4-201(2). Unconscionability may be an difficult burden when the division of marital assets is merely unfair or inequitable. Even today, women may not be privy to all of the family's finances. When family violence is present, women bear the brunt of physical abuse in marital relationships. Women may enter into an unfair agreement out of fear or merely to escape an abusive relationship.

Judges should have the authority to set aside purely inequitable agreements – those which may not rise to the level of unconscionability. Settlement agreements would parallel the general principles of the equitable distribution of property; that is, no matter when and how the agreement was reached, it must be fundamentally fair.

FARM AND RANCH PROPERTY

At the hearings and listening sessions, the division of family farm and ranch property, was strongly debated. This is an odd and unique problem to Montana. With one exception, divorced ranch wives in attendance have had to leave their home. In one instance, an attorney reported that a ranch wife wanted to keep a small acreage and develop a new home. This would have allowed the children access to both parents. The request was denied. One ranch wife who remained in her home was granted the family ranch, with a payoff to the husband, because the Court found she was the better manager.

Comments at hearings and listening sessions indicated a common belief that ranch wives did not receive an equitable share of property. One woman said her attorney would not advocate a position of equal distribution, saying the judge would not be receptive to an argument which might cause the sale of the ranch. She was forced to accept maintenance. Because of her poor health, she has little likelihood of living long enough to receive anything approximating an equitable share of the marital property.

Saving of the farm or ranch should not be accomplished at the expense of the farm or ranch wife. To do so may constitute an equal protection violation, and certainly is a gender bias issue. Courts should consider methods to allow ranch wives to stay in their

homes, or start a home somewhere on the farm or ranch property. If safety is not an issue, a farm or ranch could well accommodate more than one living site. Solutions which require the sale of all or part of the ranch should be ordered if necessary to effect an equitable division of marital property. Preservation of the family ranch, at the expense of fundamental fairness, serves to promote gender bias.

MEDIATION

Possible gender bias in family law mediation was not addressed in the Survey of Montana Lawyers and not brought up at hearings and listening sessions. Montana law permits district courts to order mediation in family law cases. Concern was expressed in other gender fairness task force reports about the appropriateness of mandatory mediation when one of the parties has been the object of abuse in the relationship. [See for example, the Gender Bias Study in the Court System in Massachusetts, p. 24.] On the other hand, Montana law prohibits mediation where one of the parties or the child has been physically, sexually or emotionally abuse by the other. M.C.A. §40-4-301(2). In some judicial districts, mediation is mandated before each family law hearing. Any future task force or implementation committee ought to examine the impact upon mediation in family law cases. While skilled and trained mediators are able to use the process in high conflict dissolutions, not all mediators have such skills or training.

Montana Task Force members would urge conscientious application of mediation principals in this area. In domestic violence situations, of course, mediation is not appropriate. However, in other aspects of family law, mediation with qualified, trained mediators has the potential for creating new avenues to reduce, minimize and perhaps eliminate gender bias problems, especially if mediators are also trained in gender fairness issues.

MAINTENANCE

There was little or no discussion at hearings or listening sessions regarding maintenance, except as discussed above in the family ranch matters. Maintenance issues deserve special attention by any future task force or implementation committee. The absence of comment cannot be construed to mean there are no gender fairness issues present in maintenance awards.

INABILITY TO OBTAIN COUNSEL

Unrepresented parties in dissolution proceedings is becoming more common, often due to the inability of the participants to afford counsel. Inaccessibility to the judicial system is a concern to all members of the legal profession, the judicial system and the public. The State Bar has established an Access to Justice Committee to address the needs of low income Montanans. But the financial difficulties of dissolution proceedings are not unique to low income individuals. Under some circumstances, the inability to afford counsel may raise gender fairness issue.

Courts may need to more thoroughly, seriously and frequently consider orders providing retainer for attorneys fees to the other party in a dissolution proceeding. One attorney told of a woman who had approached literally dozens of attorneys without finding representation. When the Court ordered the payment of a retainer, she was immediately able to obtain counsel. The process needs to be simplified and clarified.

EQUAL TREATMENT

Comments at hearings and listening sessions, and comments by attorneys, revealed a perception that, in family law cases, some judges pay more attention to male litigants, witnesses and attorneys than they do to their female counterparts. They assert that this is not an imaginary conclusion: frequently, males were given measurably more time for their presentations. Courts hearing family law cases should be scrupulous in attempting to give equal time and attention to parties, witnesses and attorneys regardless of gender, to avoid gender bias, or even the appearance of gender bias.

A FAMILY COURT SYSTEM

Much dissatisfaction was expressed, at hearings and listening sessions, about litigants' overall experience in dissolution proceedings, including the cost, the process and role of judges. There was an overwhelming perception by the participants and lawyers who commented that judges intensely dislike having to hear family law matters. This distaste of these cases by the judges occurred throughout the proceedings. Anecdotal horror stories abound of interminable delays in decision-making, of substitute decision-making,

of judges walking away from hearings, and of outright refusal to even hear family law matters. Whether the disfavor of family law by judges is a form of gender bias is unclear. What is clear, however, is that the litigants believe it is.

The Task Force believes a family court system has the potential to alleviate many problems inherent in Montana's currently overburdened judicial system. The structure, form and cost of such a system, and whether such a system can benefit Montanans, needs further study.

Judges, and the persons who report to them, should receive solid, regular and repeated training about gender bias, how it compromises the legal system, and what can be done to eliminate it. Such a training program should be implemented. A reporting system for instances of gender bias, including gender bias in family law cases, should be implemented. This procedure should include remedies when gender bias is found to exist.

CONCLUSION

Family law has the unfortunate association with what many would characterize as social ills: men battering or abusing their wives; divorced fathers seeing little of their children; obligated parents paying little or nothing for support, and women receiving proportionately less property in a dissolution than men. Clearly, some progress has been made in addressing these cultural, social and economic shames. There is still much to be done. Gender stereotypes still produce gender bias in family law. Recognition of the problems is the first step in resolving gender fairness issues. Education of all the players in the judicial system becomes the key to fulfilling the dream of equal justice for all – regardless of gender.

RECOMMENDATIONS

The Gender Bias in Family Law Subcommittee makes the following recommendations to the Court:

1. When considering parenting decisions, judges should respect the role of the primary parent.

2. Domestic violence claims should be taken seriously, especially as it affects parenting decisions and parenting ability. Denials of family violence are as easily made as accusations.
3. Parenting decisions based on gender stereotypes ought to be scrupulously avoided.
4. Visitation guidelines on a statewide basis ought to be considered. [Visitation is now encompassed in the term parenting under the latest family law revisions.]
5. Prosecution for nonpayment of child support and failure to provide visitation should be vigorously pursued. Similarly, vigorous enforcement of support and visitation orders ought to be the norm among all district courts.
6. Simplified enforcement procedures for child support, maintenance and visitation or parenting should be developed, similar to those now in effect to obtain orders of protection in courts of limited jurisdiction.
7. Courts should reject psychological or guardian ad litem reports which perpetuate gender bias and insist on training for Guardians ad Litem and other parenting decision players.
8. Courts should reject inequitable property settlement agreements, regardless of the willingness of the parties to agree to such provisions.
9. Decisions affecting the distribution of property should not differ because a farm or ranch is part of the marital estate.
10. All judges, and the persons who report to them, at all levels, should participate in regular gender fairness education programs designed for judges. Judges should encourage GALs and persons involved in parenting decisions to participate in gender fairness training.
11. All judges, at all levels, should participate in domestic violence education programs designed expressly for judges.
12. In non-domestic violence settings, courts should explore mediation with trained mediators who understand gender fairness issues and can work toward gender justice.

GENDER BIAS IN COURTHOUSE INTERACTIONS SUBCOMMITTEE REPORT

*The right of the
citizens of
the United States to
vote shall not be denied
or abridged by the
United States or by
any state on account of
sex.*

United States Constitution,
Amendment 19

in the resolution of cases.

The courthouse, whether in the courtroom or in chambers, is a place where citizens seek justice and where justice is ideally dispensed impartially, fairly, without regard to bias of any kind; where justice is blind to social status, race, creed, color of skin, religion and gender of the party, the witness, the attorney, or the judge. This subcommittee has focused on gender fairness in the context of courthouse interactions. We reviewed the results of the survey of attorneys, comments submitted at public hearings and listening sessions throughout the state, and written comments from attorneys and members of the public to determine the extent to which the reality of justice administered in Montana's courts attains this ideal of gender fairness and neutrality.

The courthouse is the hub of the judicial process. The gender neutrality or bias of courthouse interactions is a strong indicator of the extent to which gender plays a role

Interactions in the courtroom and other legal settings, such as judges' chambers, are an important area of investigation for all court gender bias task forces. These exchanges (between judges and attorneys; among judges, litigants and witnesses; among attorneys, litigants, and witnesses; and among attorneys) are a central subject for gender bias task forces because interaction is the "stuff" of professional life – what lawyers *do* is talk to judges, other attorneys, clients, and other laypersons. Moreover, *how* judges talk to attorneys and how attorneys talk among themselves may send important messages to the attorneys' colleagues and to their clients –

and may ultimately convey messages about the attorney's own professional worth. Similarly, the manner in which judges and attorneys interact with criminal and civil parties and with witnesses and jurors conveys messages about the judicial system's assessment of the validity and worth of the claims of litigants and of their contribution, as witnesses and participants, to the judicial process.

The Final Report of the Ninth Circuit Gender Bias Task Force: The Effects of Gender in the Federal Courts (July, 1993) at 49.

Gender bias, whether blatant or subtle, can influence case outcome, deprive the parties of justice, cast aspersions on the integrity of the judicial system, and disillusion those who must rely upon the system to resolve their differences:

How an individual is treated in the courtroom significantly affects how that individual's credibility is assessed and whether the individual and others present believe justice was done. When minority and women litigants, witnesses, and lawyers are treated with less dignity and respect than their white male counterparts, their credibility is undermined, and they feel that their cases were not fairly heard.

Ellis, Ronald L. and Schafran, Lynn Hecht, "Avoiding Race and Gender Bias in the Courtroom," The Judge's Book, National Conference of State Trial Judges, Ch. 6 (American Bar Association, 1992) at 40.

Montana's Task Force has been working with limited funding on a volunteer basis since 1991. During that time there has been ongoing education, both overt and subtle, of both the judiciary and the bar in this area. It is the intent of the Task Force to present the evidence gathered over that period of time and allow the group appointed to follow up on the recommendations of the task force to determine to what extent changes are still needed, and to what extent the problems already have been effectively addressed.

The survey which the Task Force conducted focuses on the interaction of attorneys and judges, but the task force also received written comments, as well as oral testimony at public hearings and listening sessions, regarding gender biased behavior toward litigants and witnesses. The preliminary results of the survey of Montana attorneys, and comments added to those surveys reveal, generally speaking, that male and female lawyers alike, believe they receive fair treatment from the state judiciary. Thirty-eight percent of male attorneys returned the survey, while 56% of female attorneys returned the survey. Of

those who returned the surveys, 39% of the responding males and 56% of the responding female attorneys added comments.

Most responding women lawyers report witnessing or experiencing gender bias within the judicial system, most often in a subtle, rather than blatant form. They spoke of "subtle sexism among male and female attorneys," and "attitudes of gender bias, rather than overt sex discrimination." A few respondents reported blatant gender-biased behavior by a judge, but for the most part respondents did not report rampant gender-biased behavior within the court system. Rather, where such behavior was perceived, it was subtle. A Montana survey respondent reported that the overt signs of gender bias are mostly gone, but that "males still retain the essential attitude of gender bias." Another respondent stated that gender bias has become "less blatant," and "more subtle." Montana Attorney Survey 2092 (38 years old). Another stated:

It is particularly disturbing that the male attorneys who are most accepting of women attorneys seem to be those over fifty, many of whom have grown daughters. Men in their thirties and forties are the ones most commonly exhibiting exclusionary behavior and overt gender discrimination.

Id. 2127 (38 years old).

Witnesses at public hearings and listening sessions across the State reported experiencing that gender does affect judicial proceedings and their outcomes. Written comments submitted to the Task Force further enforce the sense that gender is not a neutral aspect of courthouse interaction. This subcommittee report reviews kinds of behavior reported as gender bias occurring in the context of courthouse interactions, although it generally will not include such occurrences as reported in the areas of family law and domestic abuse, which uniquely pit a female against a male, because those areas are covered in greater detail by another subcommittee. This report will include behavior reported in that area when it seems to reveal a more general form of gender bias.

The data gathered by Montana's Task Force, like the data gathered by the Ninth Circuit, and virtually every jurisdiction that has examined this issue:

... suggest that gender adds an extra dimension to courtroom and law firm interactions, a dimension that is often discomforting and sometimes destructive to female counsel and perhaps to their clients. Women attorneys experience a variety of interactions that subtly and overtly undercut their own sense of professional worth. Some of these interactions take

place in the courtroom during formal proceedings. But more occur "off the record," in the judge's chambers, or outside of the judge's hearing, in the corridors and law offices. . . . Importantly, women single out their male colleagues and opponents as the source of much of the gender bias that affects interactions. . . . Furthermore, in certain areas of practice, many attorneys report that women litigants receive different treatment from both judges and lawyers, even when women lawyers are not subject to such bias.

Id.

DISPARITY BETWEEN NUMBER OF MALE AND FEMALE JUDGES

There are several aspects of courthouse interaction. The disproportionate number of male judges to female judges is one objective area of gender inequity within the courthouse setting. According to the State Bar, 580 of 2659 licensed Montana attorneys practicing within the State of Montana, or 22%, are women; and 201 out of 851 licensed Montana attorneys practicing out of State, or 24%, are women. Yet, only one of seven or 14% of our Supreme Court justices is female; and only five of our thirty-seven or 14% of our district court judges are female, two of whom were first elected at the end of 1994, and one of whom was just appointed at the beginning of 1998. While the balance has moved closer in recent years to the ratio of practicing attorneys, male litigants and witnesses appear before judges of their own gender far more frequently than do their female counterparts. Similarly, male attorneys practice before judges of their own gender far more frequently than do their female counterparts. This has generally been the finding of task forces in other states as well.

THE JUDICIAL NOMINATION PROCESS

A female applicant reported on applying for a district judge position in the early 1990's in a district in which she did not reside. The application received from the Judicial Nominating Commission asked for the "name of applicant's wife." In her interview, Commission members asked her whether her husband would move to be with her if she were chosen for the position; and whether he had applied for positions in that town already.

She did not believe such questions would have been asked of male applicants, or that they were appropriate questions, leading to the suggestion that the application be revised to reflect gender neutral questions and that the Commission be trained in appropriate and inappropriate areas of inquiry. While this might seem to be a singular occurrence, other task forces have reported similar findings. The Idaho task force, for example, reported that, "women candidates for judicial appointments are asked more questions related to their gender than to their qualifications." "Gender Bias in the Court Environment," Idaho Gender Bias Task Force Report, Ch. 1 at p.4.

One of the members of this subcommittee is a member of the current Judicial Nominating Commission and reports that this problem has been addressed by the current Commission. Since 1994, the application has been revised to be gender neutral and eliminate any inquiry into the personal life and family status of the applicant. Since membership on the commission changes from time to time, it nevertheless appears appropriate to establish a procedure under which new members receive guidance or training at the beginning of their terms regarding appropriate and inappropriate areas of inquiry during interviews of candidates, so that they do not pose gender biased questions, and that they also inquire into a candidate's attitudes with respect to this issue, including the candidate's awareness of behaviors which indicate gender bias and the need for a judge to take corrective measures to address such behavior when it occurs, as well as the candidate's awareness of methods for addressing such behavior when it occurs, and of preventing it in the first place.

ATTORNEY BEHAVIOR TOWARD FEMALE JUDGES

While Montana has only limited experience with female judges, and our surveys did not inquire into this area, other states report that male attorneys more frequently seek to substitute or disqualify female judges. Other task forces in other jurisdictions routinely find less deference is shown to female judges than to male judges. Our subcommittee did not gather information regarding the extent to which female vs. male judges are substituted or the extent to which males vs. females move to substitute either gender. This is an area of possible gender bias which still needs to be evaluated in Montana.

Another problem area is the way women in the judiciary are treated. Often attorneys and other judges show less deference to female judges than to male judges. Additionally, women candidates for judicial appointments are asked more questions related to their gender than to their qualifications. These problems could be solved by revising of the Rules of

Professional Responsibility to include a disciplinary rule relating to attorney misconduct in the areas of gender, religious, and ethnic bias, and by adopting uniform policies and standardized procedures and questions for use by judicial nominating and selection groups.

"Gender Bias in the Court Environment," Idaho Gender Bias Task Force Report, Ch. 1 at p.4.

BIASED BEHAVIOR TOWARD FEMALE WITNESSES AND LAWYERS

Members of the public and attorneys reported to the Task Force incidents in which male attorneys and sometimes male judges, treated female witnesses or lawyers rudely, with inappropriate familiarity, condescendingly, patronizingly, or non-attentively. Some of this behavior occurred in cases in which the case itself focused on inappropriate sexual behavior, rape or other violent sexual crimes.

A female deputy county attorney reported that she was prosecuting a rape case and filed a motion for discovery in the form of samples of semen and pubic hair. The judge, a male, asked her, in open court, in the presence of the defendant, his counsel, a clerk and the court reporter, if she wanted to collect it herself.

A survey respondent reported that a district judge told her she had better consult with her male law partner because the judge disagreed with the position she took in a case.

A member of MACEM (Majority Against Child Molestation) reported at a public hearing that their organization has observed that sexual crimes against females are pursued far more slowly than are sexual offenses against male victims. She reported that a male judge, in a case of molestation of a 14-year-old girl, questioned the girl hostilely, appeared not to be listening to the evidence, stared out the window, and commented at one point, "Are we having fun yet?" and at another point, "how long do I have to hear all of these witnesses?" Her perception was that molestation of females is treated far less seriously than is molestation of a male.

Another member of the public reported that the male judge in her custody case, by his verbal and nonverbal courtroom demeanor and comments showed a lack of respect for her female attorney and her female expert (endlessly questioning her credentials, while

asking no such questions of the opposing party's male expert; appearing to be daydreaming, gazing out the window, thumbing through papers on the bench while the female expert testified; then listening "rapturously" to the male opposing expert). This anecdotal report is mirrored in the findings of other jurisdictions.

Several states reported that attorney surveys reflected concerns about reduced credibility and respect afforded female attorneys. The gravamen of this concern is subtle, rather than overt, behavior toward women by the judiciary, by other counsel, and by court personnel. Some examples of this behavior are that women are interrupted by judges more frequently than men are interrupted, women receive deferential treatment which results in demeaning women in court, women are addressed by first names or by terms of "endearment" while men are addressed by surnames or by titles, women are subjected to comments about their physical or sexual attributes or appearance, and women are subject to unwelcome advances by members of the judiciary and by other counsel. The Minnesota task force found that some judges and attorneys appear to accord less credibility to the statements of women. They express undue impatience with or harsh criticism of women in the courtroom which they do not express with respect to men in comparable situations. Some judges also appear to tolerate or encourage certain behavior by male professionals which they devalue in female professionals such as aggression, assertiveness and other departures from the "feminine" ideal.

"Gender Bias in the Court Environment," Idaho Gender Bias Task Force Report, Ch. 1 at p.2-3.

Respondents report that women attorneys are expected to behave in accordance with feminine stereotypes, and are often subjected to criticism if they do not.

[M]ale attorneys who are difficult, demanding, or unfriendly are tolerated. Women who have the same qualities are described as bitches, radical feminists, suffering from PMS, or not getting enough sex. Likewise, any assertiveness or zealousness on behalf of a client is "bitchy."

Again, this report is mirrored in the findings of other state task forces and the National Conference of State Judges:

Aggressive behavior is rewarded or tolerated from men but viewed as out of place or even unacceptable for women, who are supposed to be passive, quiet, and deferential. Women attorneys have been criticized and admonished for aggressive cross-examination tactics or any sarcastic tones toward male witnesses, while male attorneys are permitted to use exactly these tactics against all witnesses.

The Judge's Book, *supra*, at 41-42.

Approximately one-third of the responding Montana attorneys in our survey believed that judges or attorneys frequently [25%] or almost always [6%] accord less credibility to female counsel, than to male counsel, who is an aggressive advocate. A similar number perceive judges or attorneys frequently [20%] or almost always [9%] according less credibility to a female witness, than to a male, who is emotional on the stand. Forty-four per cent perceive judges as rarely or never [31%], or only sometimes [13%] intervening to stop demeaning comments or behavior when they occur in the court or in chambers. Approximately one-fourth of the respondents perceive male counsel as frequently [20%] or almost always [6%] addressing female counsel less formally than male counsel in court and frequently [22%] or almost always [7%] in chambers. Similarly, 25% of the respondents perceived male counsel as frequently [19%] or almost always [6%] addressing female litigants or witnesses less formally in court or in other formal proceedings. A vast majority [63%] of female respondents, but only a minority [24%] of male respondents perceived such behaviors as a form of gender bias that can adversely affect the outcome of the case and undermine counsel's credibility.

Task forces in other jurisdictions identify these kinds of behavior as a prevalent form of gender bias within courthouse interactions, as does The Judge's Book:

According to communications experts, nonverbal communication carries four times the weight of speech content. A judge may be unconsciously conveying powerful negative messages to everyone in the courtroom solely through posture, tone of voice, and quality of attention to the speaker. Some of the ways in which these messages are conveyed include listening attentively to and making eye contact with white men but shuffling papers and turning away from minorities and women; speaking to white men in a

neutral, straightforward tone of voice but using a hostile or condescending tone to women and minorities, having nothing to do with what they are saying; consistently responding to white men's questions or statements within a few seconds but consistently delaying more than five seconds to respond to other kinds of speakers. A recent study of criminal trials in Santa Clara, California, concluded that judicial beliefs about guilt or innocence seemed to "leak" to the juries most in purely nonverbal forms of communication.

The Judge's Book, *supra*, at 42.

FORMS OF ADDRESS

Different forms of address can also reflect differential treatment of the genders, to the potential detriment of attorneys and clients. A female attorney reported at a public hearing that a judge asked her if she really was an attorney. She also heard male attorneys address her and other female attorneys as "my dear," "honey," "sweetie," or "darling." She also reported hearing a judge address male attorneys by their first names, while addressing her more formally. She did not care how the judge chose to address attorneys, but simply wanted to be treated the same way the men were. She also reported that a female juror had told her that the attorneys in voir dire addressed the female jurors by their first names, while referring to male jurors as "Mr." A male calling the legal office she works in told her, "I don't want to talk to any woman. I want to talk to an attorney." Of course, the judiciary and members of the legal profession are not directly responsible for such public perceptions and misconceptions, but the subtle undermining of female lawyers, litigants, jurors, and witnesses by judges and male lawyers perpetuates such unfair and stereotypical perceptions.

Thirteen per cent of the survey respondents reported that state judges frequently or almost always address female counsel less formally or professionally than male counsel; 19% reported that state judges frequently or almost always cut off women attorneys while they are speaking, while permitting male attorneys more time to make their point; and 13% reported that state judges are stricter with female counsel, seemingly because she is a woman.

Other task forces similarly have reported findings of judges and attorneys using inappropriate and familiar forms of address toward female attorneys, which can undermine the credibility of the attorney to the disadvantage of the client. The Judge's Book

comments about the significance of consistency in forms of address and treatment of the genders:

Judges need to be sensitive to the possibility of discriminatory verbal and nonverbal behavior on their own part and on the part of those under their supervision. Judges should also appreciate how difficult it is for the individual subjected to discriminatory behavior to object, and that when there is discriminatory behavior on the part of lawyers (cited in many studies as the principal offenders), court personnel, or others, it is the judge's obligation to intervene to eliminate it.

The Judge's Book, *supra*, at 42.

FAILURE OF JUDGES TO INTERVENE

Other task forces have emphasized the role the judge can and must play to eliminate gender bias in courthouse interactions by intervening and stopping such behavior when it occurs. In the survey of Montana attorneys, this was the most obvious failing of the Montana judiciary with respect to gender bias. Generally, most respondents did not perceive state judges as behaving in a biased manner toward female counsel, except to the extent that judges fail to exercise their authority in the courthouse to intervene when gender biased behavior occurs in their presence. Fifty-seven per cent of the respondents reported that state judges rarely, never, or only sometimes intervene to stop demeaning comments or behavior when they occur in court or in chambers. Judges can do a great deal to eliminate gender biased behavior by simply intervening when such behavior occurs. Effective judicial intervention will require education of the judiciary in recognizing and appropriately addressing such behavior when it occurs. As the Idaho Task Force reported:

Corrective intervention from the bench appears to be the most effective mechanism for correcting inappropriate behavior of court personnel and other counsel. Judges need to become educated about gender bias and its effects, then translate that education into action. Judges can do this by setting examples in their own decisions and their own behavior, and by playing an affirmative role in assuring that others in the judicial and legal environment (counsel, court personnel, litigants, and witnesses) treat women and men with equal respect.

"Gender Bias in the Court Environment," Idaho Gender Bias Task Force Report, Ch. 1 at p.4.

Attorneys and members of the public who come before the court should be able to expect judicial intervention when such behavior occurs. One survey respondent commented:

I tried a two-day custody case in state district court (I represented the father). Opposing counsel repeatedly referred to me as "young miss" or "Miss ____." He would race to my table and yell at me for interrupting him every time I made an objection. I kept looking to the judge for assistance, but he seemed to be amused by the other attorney. I was so disappointed in the judge for not admonishing the other attorney.

Montana Attorney Survey, 2070.

MALE VS. FEMALE PERCEPTIONS OF BIAS IN COURTHOUSE INTERACTIONS

The preliminary results of the survey of Montana attorneys reveal that a majority of female respondents perceive some gender bias in courtroom interactions, while only a minority of male respondents share that perception. Respondents who perceived gender bias in courtroom interactions also believed that bias affected the litigation and its outcome. Survey respondents did not perceive any significant level of male comments on physical appearance or dress of females, or of male comments of a sexual or suggestive nature to females in court or in chambers, although respondents did report significant perceptions of male counsel frequently or almost always making demeaning or derogatory remarks to or about female counsel outside the hearing of a jury [22%]; during case-related discussions NOT involving the judge, such as settlement negotiations [20%]; and in less formal professional settings or gatherings [30%]. Female respondents overwhelmingly [72%] perceived such behavior as a form of gender bias that imposes a special burden on female counsel relative to their male counterparts, while only 21% of the male respondents perceived such behavior as burdensome to women.

Similarly, respondents reported significant levels of male counsel cutting off or ignoring female counsel's arguments whether during off-the-record proceedings involving the judge [27%], during case-related discussions NOT involving the judge [32%], or in less formal professional settings or gatherings [33%]. Again, female respondents perceived

such behavior overwhelmingly [76%], to be a form of gender bias that imposes a special burden on female counsel relative to their male counterparts, but only a minority [25%] of male respondents shared that perception.

This difference in perceptions is reflected in the findings of other task forces. The differences in perceptions between male and female lawyers do not appear to be a function of age, nor can we expect that as the "older generation" retires, gender bias issues will recede in importance. "The Effect of Gender in the Federal Courts," The Final Report of the Ninth Circuit Gender Bias Task Force, (July, 1993) at 50. Rather, the Ninth Circuit Task Force found sharp gender differences among younger and older attorneys alike and that the differences in perception between men and women below the age of 40 mirrored those of men and women over 40. Id.

As the Alaska Joint State-Federal Courts Gender Equality Task Force Report points out, such differences in perception should not be disregarded.

... gender bias is experienced and recognized more often by women than by men. Often women saw gender bias where men did not. One explanation the Ninth Circuit study provided was that women and men operate in two separate worlds. Men frequently were unaware of gender bias because it was not focused on them. 'Another possibility is that women and men observe the very same event but interpret them differently,' the Ninth Circuit Task Force wrote, adding, 'However, the problems of gender bias cannot and should not be dismissed as only ones of differing perspectives, accompanied by a ' vive le difference.' Many men have not considered the relevance of gender and, until problems are identified to them, may assume that problems of gender bias do not exist. Once the issues are identified, men as well as women can see how gender is operating to affect courtroom interactions and outcomes, the workplaces of the profession and the assumptions that surround them. Further, men and women together have the responsibility to understand how gender bias can cause harm and to work together to redress the injuries documented.'

Alaskan Joint State-Federal Courts Gender Equality Task Force Report, April, 1996, p.13, citing the Executive Summary, The Effects of Gender in the Federal Courts, The Final Report of the Ninth Circuit Gender Bias Task Force, July 1993, p. 19.

In summary, we can conclude that gender bias is not a neutral factor within courtroom interactions in Montana. It detrimentally affects women who enter the courtroom as attorneys, witnesses and parties to litigation in a generally subtle rather than blatant form.

RECOMMENDATIONS

The findings discussed above regarding gender bias in courthouse interactions in Montana are based on data gathered within Montana from Montanans. They are, however, substantially similar to findings in this area which have been reported by other state and federal task forces. Those task forces generally recommend a variety of ways to effectively reduce the occurrence of this kind of gender-biased behavior and its damaging effects. For example, many states have found that gender bias occurring in the courtroom can be effectively reduced if judges intervene in a timely and appropriate manner to stop it. This will require education and perhaps a mandate to judges. Additionally, many states have recommended the adoption of rules of judicial and professional conduct directly addressing such behavior. Some states have adopted judicial handbooks such as those appended to this subcommittee's report.

The Gender Bias in the Legal System Subcommittee recommends the following to reduce the occurrence of gender bias within courtroom interactions:

1. That the Montana Supreme Court establish a Commission to Eliminate Gender Bias in the Courts to propose ways to implement the task force's recommendations and act as a liaison to the Supreme Court, the State Bar and other entities and individuals concerned with the elimination of gender bias in the Courts.
2. That the Montana Supreme Court promulgate and adopt policies specifically condemning gender biased conduct by judges, attorneys and court personnel; and declaring that gender-biased conduct by bench, bar, or court personnel is unprofessional and not to be tolerated.
3. That the Court and the Bar develop and publicize an effective procedure for confidential reporting and receiving, investigating and addressing complaints of gender bias occurring within courthouse interactions.

4. That the Court and Bar provide training to judges, attorneys and court employees to increase awareness of both subtle and overt manifestations of gender bias and its consequences, as well as appropriate ways to intervene and prevent such behavior. Training should address conduct, language, demeanor, and court rules and should assist women in constructive responses to words or actions that are biased. The most effective training appears to be that in which the participants are actively involved, and not simply a passive audience.
5. That the Court require judges to intervene swiftly to correct attorneys and court personnel who exhibit gender biased behavior in the courtroom or in chambers; provide training regarding behavior requiring intervention and appropriate methods of intervention.
6. That the Court promote and encourage the use of gender neutral language in judicial decisions, in oral communications and in court correspondence.
7. That the Court adopt Rules of Judicial Conduct directed toward gender biased behavior, such as the revised CANONS 2C and 3B(5) and (6) of the Draft Model Rules of Judicial Conduct of the American Bar Association, which provide in part:
 - a. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of gender, race, religion, or national origin.
 - b. A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. A judge shall require lawyers in all proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice against parties, counsel, or others.

- c. A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This . . . does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors are issues in the proceeding (Canon 3B(6))
8. That the Court amend the Montana Rules of Professional Conduct to impose a duty on attorneys to behave in a manner which is free of gender bias. Sample provisions adopted by some states to address this concern provide:
 - a. In representing a client, a member of the bar shall refrain from engaging in conduct that exhibits or is intended to appeal to or engender, bias against a person on account of that person's gender, race, religion, or national origin, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officer, or any other participants.
 - b. It is professional misconduct for a lawyer to commit a discriminatory act prohibited by law or harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination or harassment is committed in connection with the lawyer's professional activities.
9. That State and local bar associations provide ongoing training and education about gender bias and methods for addressing and preventing it. Where possible, training should involve lawyers as active participants.
10. That the Bar recruit representative numbers of qualified women as faculty in continuing education programs.
11. That the Bar include gender bias issues as part of the following educational materials and programs:
 - a. State Bar reports;

- b. Section newsletters;
 - c. programs at the annual meeting;
 - d. programs at bar leaders' meetings;
 - e. lawyer education programs; and
 - f. programs developed as part of mandatory continuing legal education.
12. That the Judicial Nomination Commission be provided information and offered training regarding gender bias issues, both to eliminate gender biased questions from the interviews and to increase Commission member awareness of this issue and ways to explore candidates' awareness of gender-bias within courtroom interactions and their ability to intervene and stop such behavior when it occurs, and to prevent it in the first place. The Judicial Nomination Commission should be provided with proposed questions for use in interviews similar to those prepared by the National Association of Women Judges [appended to Hawaii's Task Force Report and to this subcommittee report] as a guide for formulating questions designed to elicit the level of sensitivity to gender bias on the part of the applicant.
13. That the Commission established by the Supreme Court to implement the recommendations of this Task Force provide materials for distribution by the State Bar to attorneys and the public regarding the nature and effects of gender-biased conduct and recommendations to avoid it, as well as setting forth the procedure for reporting, investigating, and handling complaints of gender-biased behavior by attorneys.
14. That the Commission established by the Court develop a Court Handbook including uniform rules of courtroom decorum to educate court personnel, attorneys, and judges on the use of behaviors that promote gender equality. The handbook should include at least the following: use of surnames when addressing jurors and opposing counsel; prohibition of disparaging remarks or displays of ill will between counsel; and the requirement that counsel refer to opposing counsel in courteous terms. The Commission should also make proposals regarding distribution of the handbook to participants in the judicial system. Sample handbooks developed by other states are appended to this report.

15. That the Court require that jury instructions, court rules, and the Code of Judicial Conduct be written in gender-neutral language.
16. That the Law School curricula include issues of gender bias in courses whenever appropriate, developing programs to help sensitize students to gender-bias issues and prohibiting gender biased behavior by teachers or students. Law school administrators and professors should be sensitive to issues of gender bias and serve as role models for the profession in this respect. Review course materials to avoid stereotyping.

GENDER BIAS IN THE LEGAL SYSTEM

SUBCOMMITTEE REPORT

INTRODUCTION

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, political or religious ideas.

Constitution of Montana
Section 4

This subcommittee report pulls together information not otherwise addressed by the Courthouse Interactions or Family Law Subcommittees, specifically including information regarding difficulties encountered by women in the practice of law; in obtaining and maintaining employment; in advancing in employment and the profession; in balancing the conflicting demands of family and practice, which studies show more heavily plague women attorneys; as well as information gathered regarding perceived differences in civil damages awarded to males versus females; and inequities perceived in the handling of domestic violence and sexual offense cases.

The Paradox: Women are approaching Equal Numbers in The Profession, but Continue to Experience Barriers in Advancement

Although women have entered the legal profession in large numbers during the past decades, they often have found their paths to the upper reaches of professional life steep and stony. They now represent 29 percent of the nation's lawyers, up from 13 percent in 1985. Statistics Abstract U.S., 1997 Edition. Women make up 30 percent of the Montana Bar but these numbers tell only part of the story. Women comprise about 44 percent of the nation's law school students. ABA Commission on Women in the Profession, Elusive Equity: the Experience of Women in Legal Education, pg. 23 (1996). The current law school population at the University of Montana is 39 percent female. This is typical of student gender allocation in recent years at the University of Montana School

of Law. Yet, the American Bar Association's Commission on Women in the Profession reported that, "Sadly, gender bias and the barriers it creates to women's full and equal participation have not disappeared as the result of the increased number of women students and faculty." *Id.* at 2.

When asked if men and women have an equal chance of being hired for entry level positions, 50 percent or more of both genders felt they have equal chances (64% of males and 50% of females). Of those who felt one or the other gender has a better chance of being hired, more females (16%) than males (4%) believe men have a better chance of being hired than women, and more males (10%) than females (5%) believe women have a better chance.

MEMBERSHIP ON PROFESSIONAL COMMISSIONS/COMMITTEES

For the most part, the Supreme Court appointed commissions are gender balanced. However, several commissions do not currently have adequate female representation. The Advisory Commission on Rules of Civil and Appellate Procedure has one woman out of ten members. The Commission on Rules of Evidence has one women out of eleven members and the Civil Jury Instruction Guidelines Commission has one woman out of thirteen members.

The Commission on Practice is not a direct court appointment, but its history is notable. The membership of the Commission has never included a female attorney. A Commission member highlighted the lack of female representation on the Commission and the lack of women practicing before the Commission. During one meeting of the Commission, one Commission member inappropriately commented that she was, "better looking than most people that appear before them."

Of the fifteen members of the Board of Trustees of the State Bar, six are women. The committees of the Bar also appear to be gender balanced.

DISPARITY IN PROMOTION

Although the number of practicing women attorneys has steadily and proportionately increased, the number of women attorneys in partnership or higher level positions has not

increased commensurately. This is true of the profession generally as reflected in studies conducted by the American Bar Association. One study notes that the number of women partners, although increasing, remains small, and few women serve in top management positions. Cynthia Fuchs Epstein, et al., Glass Ceilings and Open Doors, Women's Advancement in the Legal Profession, 64 Fordham L. Rev. 291 (1995).

Nearly equal numbers of males and females felt that their gender had no effect in a number of surveyed situations which play a role in professional life (relationships with other attorneys in their firm; referrals from other attorneys; assignment of complex cases, federal cases, or high profile cases; and rate of promotion. Many more women than men view their gender as a negative factor in all ten situations inquired into by the Task Force survey. Male and female survey respondents respectively indicated their gender played a negative role as follows: In relationships with attorneys outside their firm – 3 percent of males versus 44 percent of females; in obtaining referrals of complex cases from other attorneys – 3 percent of males versus 29 percent of females; in relationships with attorneys in their offices – 2 percent of males versus 27 percent of females; in the rate of promotion – 1 percent of males versus 26 percent of females; in the assignment of high-profile cases – 1 percent of males versus 24 percent of females; in the referrals of cases from other attorneys – 3 percent of males versus 23 percent of females; in the assignment of complex cases – 2 percent of males versus 19 percent of females; in office space assignment – 1 percent of males versus 13 percent of females; in the assignment of federal cases – 1 percent of males versus 11 percent of females; and in the assignment of cases requiring out-of-town travel – 0 percent of males versus 11 percent of females.

When asked whether men or women have an equal chance to be promoted to partner or a senior position, two-thirds of the males maintain the belief that chances are equal for both genders while only about one-third of the females feel men and women have an equal chance of promotion, and 13 percent of the females versus 1 percent of the males feel men have a better chance. Neither males (0%) nor females (1%) think women have a better chance of promotion than men. On this specific question, 34 percent of the males and 41 percent of the females were undecided or had no opinion.

A recent consumer satisfaction survey of the Montana State Bar (1998) indicates that female attorneys generally earn significantly less than their male counterparts in nearly every age group:

| Percentage Of Age Group Who Are Female | Earn More Than \$50,000/Year | Males | Females |
|--|------------------------------|-------|---------|
| 58% | Ages 25 - 34 | 24% | 17% |

| Percentage Of Age Group Who Are Female | Earn More Than \$50,000/Year | Males | Females |
|--|------------------------------|-------|---------|
| 54% | Ages 35 - 44 | 57% | 37% |
| 17% | Ages 45 - 54 | 73% | 48% |
| 10% | Ages 55 - 64 | 80% | 36% |
| 2% | Ages 65 and older | 60% | 1% |
| | Overall | 53% | 34% |

The Paradox of Government Employment: Greater Flexibility vs. Disparate Advancement

Some women attorneys in Montana report that they work in the public sector, in education or other jobs outside of Montana's law firms for a variety of reasons. These include flexible work schedules, the availability of part-time employment and for other reasons reflected in the comments cited above. This fact is reflected in other studies:

Bar studies report that women continue to enter government (state, local and federal) in greater proportions than men (22% women, 12% men in Minnesota and 22% women, 17% men in Liefland's study). . . . It is clear, though, that various forms of government employment are still very attractive to women.

American Bar Association Commission on Women in the Profession, Options and Obstacles, A Survey of the Studies of the Careers of Women Lawyers, July 1994.

The American Bar Association's Commission on Women in the Profession reviewed the status of women in all types of practices throughout the country and reported that women and men are equally able to find initial employment as attorneys, but women are often paid less as they acquire experience and there is a dearth of women in law firm partnerships and among corporate general counsel. Even in the public sector, which historically has been more hospitable to women attorneys, the Commission found comparatively few women in supervisory positions despite the large number of women attorneys in government offices. American Bar Association Commission on Women in the Profession, Unfinished Business: Overcoming the Sisyphus Factor, pg 10-14 (1995).

DISPARATE TREATMENT IN INTERVIEWS

Although survey results and studies indicate both male and female attorneys obtain employment with equal ease, more female respondents report discriminatory interviewing and hiring experiences. One woman attorney reported to a task force member that when she was interviewed, she was asked questions related to child care and the status of her personal life. She did not believe male attorneys were asked those questions.

A survey respondent reported that the top six graduates were women, but none of them received job offers in Missoula and most ended up having to move to find employment. Task Force Survey, 2187. Another went through a lengthy interview and was told at the end that "we may not hire anyone now because all of the applicants were women."

Two different women respondents reported that judges referred to their parental status in interviewing them. "One of my first job interviews, during my last year of law school was for a judicial clerkship. I was about six-and-a-half months pregnant with my first child. I was going to have a baby. Being an attorney, even a law clerk, [the judge] said, was too demanding to allow me to be a good parent." Task Force Survey, 2055. The other reported that, "As a senior in law school, I interviewed with a judge for a clerkship. This judge was known to be liberal and consistently hired female clerks. I asked to be considered for a clerkship to begin the following January, because I was to have a baby in April. I was told that I should stay home with my baby. I pointed out that my child would be nine months old and was my second child."

FAMILY RESPONSIBILITIES CONSTITUTE A BARRIER TO ADVANCEMENT FOR WOMEN

Some of the comments in the prior section reflect the report of inquiries into women's family situation as relevant to a woman's eligibility for employment. Several female attorneys also report that their firm's policies discourage women from having families or indicate that if they do, their ability to advance in their firms will be limited. Family responsibilities are perceived as a barrier to a woman advancing in the profession, but not to a man. Many women report that their firms do not allow for part-time employment for men or women. And, if the firm does allow for part-time work, at times part time employees receive differential treatment. One woman reported that a firm she was

interested in joining allowed the option of working half-time, but paid such employees, generally women, less than half of the salary received by full-time male counterparts. The reason given was to cover the "overhead of the office." Another female attorney reported that while part-time practice was an option for her, if she went part time, she would never be eligible for partnership status. Somewhat on the same issue, when asked by a task force member whether his firm had a maternity leave policy for female attorneys, an attorney responded, "we don't need one, we don't have any female attorneys."

Other studies summarized below in a report of the American Bar Association, also find that family responsibilities are a concern to employers and a barrier to advancement in the profession for women, but generally not men:

There is evidence that family responsibilities continue to create barriers for women in the profession. The majority of studies that investigate family responsibility issues, such as the Indiana Bar Association study, report that the decision to have a family produces delayed opportunities for lawyer-mothers and long-term economic disadvantages. While it is true for both genders that the higher one climbs, the more subjectively decisions are made, the compensation level for women appears to reflect assumptions about future productivity and commitment to the professional enterprise. The investigation of the impact of family on career should be widened to encompass a number of issues. Despite stereotypes of how women with children will function in the workplace there are no studies indicating that they take their professional responsibilities less seriously; there is no information demonstrating that they are less productive, less available, or less responsive to client needs or court calendars. In fact, stereotypical beliefs about women reinforce the idea that women are better time managers. One study mentioned that male lawyers spend more time socializing with coworkers than do female lawyers. Another surprising finding, reported in the Journal of Legal Education survey of graduates of the University of New Mexico from 1975 to 1986, indicates that male lawyers worked significantly more total hours, but not more billable hours, than female respondents. Certainly lawyer-mothers (and perhaps women generally) have had to learn to manage their time efficiently.

American Bar Association Commission on Women in the Profession, Options and Obstacles, A Survey of the Studies of the Careers of Women Lawyers, July, 1994.

Several women recently reported to the Montana Task Force that if they are in the office fewer hours than the men, even if they accumulate more billable hours in the time they are in the office, they are not taken as seriously and are slighted by other members of the firm.

In response to the Task Force Survey one woman reported that, "Women, especially women with children, are shunted onto a non-partnership track with less pay and less prestige."

Another survey respondent commented:

The uniform billable hour requirement makes very unequal demands on the person (generally a man) with a stay-at-home spouse or a spouse who works part-time and the person (generally a woman) who is a single parent or has primary child-raising responsibility. It does not allow the firm to value individuals and creates resentment between the lawyers in these different circumstances.

Another woman commented to the Montana Bar Association's President's Commission on Women in the Profession that, "if I played more golf, I'd be more accepted by my colleagues, but that is not how I choose to spend my time, I want to be with my children, that just isn't as important in the eyes of the men in my office."

These survey findings find support in the Montana Bar Association's President's Commission on Women in the Profession Final Report. That Commission examined studies from other states as well as information gathered from members of the Montana Bar. The Task Force has found the Report an invaluable tool in addressing many issues related to women in the profession in Montana and is incorporated into this Report. We will highlight a few areas of the report in light of recent reports made to the task force members.

The President's Commission on Women in the Profession reports that:

- Attorneys who balance family commitments with careers are frustrated that some senior male attorneys do not or will not acknowledge the strain. Respondents to the foregoing survey observed that many senior attorneys have at-home wives who do everything for them on the personal and

household sides of their lives and thus take it for granted that these things "get taken care of."

- The Oregon State Bar Ad Hoc Committee on Combining Family and Career addressed, and continues to address the issue of competing demands of family and career. Their report observed that time at the office may reinforce behavior that is inappropriate to the family; that an adversarial and a nurturing role are not always compatible; that communication techniques that take the form of questioning do not foster intimacy.
- The American population is growing older and elder care, traditionally a woman's responsibility, is fast becoming a concern for both women and men as the general population ages. The ABA reports that, according to the National Council on Aging, at least 20% of the 100 million people in the paid work force have some responsibility for elderly relatives.
- The ABA reports, too, that it learned that law firms with "family friendly" policies are better able to attract and retain talented attorneys, both men and women, and that law firms without these policies want to know how to develop them.
- The final report of the Ninth Circuit Gender Bias Task Force (Executive Summary, July 1993) finds that formal and informal work/life policies within the Circuit provide little support for family life. The study also reports that women on the bench and in the bar of the Ninth Circuit are less likely than men to choose marriage and parenthood – and are more likely to suffer adverse professional consequences when they do.
- Women attorneys reported, too, that if they work less than 50-60 hours a week in order to accommodate their children and home/private life, they are regarded as "not really serious" about being a lawyer. But if they work longer hours and do not spend time with their children or on the home front, they are criticized for being less than fully attentive or dutiful mothers.

"Several recent studies document that female lawyers are significantly less likely than male lawyers to have children."

ABA Commission on Women in the Profession.

- The ABA reports the above and states, too, that a firm's comprehensive written parental leave policy conveys this important message: lawyers need not remain childless to advance in the profession. The ABA Commission's opinion is that a firm with nothing more than a disability policy that covers childbirth does not really have a parental leave policy. A sound parental leave policy encompasses more than medical minimum.
- The Oregon Ad Hoc Committee on Family and Career recommends that all employers of attorneys make every reasonable effort to allow attorneys to work flexible hours and to approve part-time work in accordance with a policy proposed by the Bar. The Oregon Committee learned that the large majority of law offices have no written policies on part-time work. Oregon found that the "up or out" system of promotion, traditional in law firms, mandates that non-career concerns be made subordinate during this "dues-paying" period. This results in a loss of talent and assets for the firm adopting such a system. Oregon suggests flexibility – firms should consider positions other than associate or partner, for example, non-equity partners, permanent associates, or contract attorneys.
- The ABA Commission on Women in the Profession addressed the issue of sexual harassment and its prevalence. The Commission reported that sexual harassment is trivialized by some as "normal" behavior growing out of the natural attraction between the sexes, when, in fact, sexual harassment encompasses a range of inappropriate behaviors on the part of supervisors and co-workers, and of customers and clients, as well. The Commission further observed that an educated understanding of what may constitute sexual harassment is important, because women and men tend to perceive these behaviors differently, with women perceiving many more behaviors as offensive than do men. Additionally, the ABA Commission reports that many women unwillingly "participate in" exchanges with male supervisors and co-workers that have sexually harassing overtones, because they believe it is the only way to avoid being ostracized.
- An article in the January, 1994 *Trial* magazine entitled "Sexual Harassment: An Ounce of Prevention", by Lynn Hecht Schafran, lists the following components of an effective sexual harassment prevention program: a comprehensive written policy; repeated communication of that policy to everyone in the firm; and initial and refresher prevention training for all attorneys, paralegals, and support staff. Schafran points out that research repeatedly documents that men and women have very different attitudes about the welcomeness of sexually-oriented conversation, jokes, pictures,

and behavior in the work place, and that these attitudes need to be discussed at training programs.

President's Commission on Women in the Profession, Final Report, April 1994.

GENDER LIMITS WORK ASSIGNMENTS AND OPPORTUNITIES TO INTERACT WITH CLIENTS

Survey respondents reported disparate treatment of women and men in assigning work, demeaning behavior toward females at meetings and in handling cases, as well as a failure to provide equal opportunities to female attorneys for client interaction in social situations, all of which can contribute to a decreased opportunity to engage in challenging work or to otherwise advance in their professional development within the firm. One respondent stated:

Women in my firm, associates and junior partners, are more likely to be asked to assist with research, brief-writing and pre-trial work, and are less likely to be assigned cases.

Another stated:

I have been assigned to read documents solely, even though I graduated at the top of my law school class and have been in practice ten years; men are invited to strategy sessions.

Other comments include:

Male associates and junior partners are invited by partners to participate in client development activities, like lunches, sporting events, service clubs. Women are less frequently invited and less frequently introduced to adjusters and established clients or to other attorneys and judges. A competent and experienced female litigator who had skillfully prepared a significant wrongful death case for two years was pulled as trial counsel two weeks before trial because the client expressed unease at having a woman trying the case. A male

attorney had to scramble to prepare, relying on her, of course, to bring him up to speed.

The same respondent commented that:

Male attorneys frequently take over meetings with clients which they attend by constantly interrupting female attorneys or commonly by 'translating' what the woman says, repeating her remarks in slightly different words, as if he can give the message more credibility. When another woman attorney and I are conferring, we are routinely interrupted by male attorneys, who often assume we are not talking about work. When I am conferring with a male attorney, that never happens.

SEXUALLY Demeaning OR HARASSING BEHAVIOR

Female attorneys reported incidents of sexual harassment as well. Recently, a female attorney reported that she felt forced to leave her employment because she complained of sexual harassment. She requested that the specifics of the harassing behavior not be reported because they would identify her. The harasser was allowed to continue to retaliate against her without any action from management. When she complained about the retaliation, the manager said, "this is his work environment too, you know."

Another respondent commented, "[M]ale attorneys who are difficult, demanding, or unfriendly are tolerated. Women who have the same qualities are described as bitches, radical feminists, suffering from PMS, or not getting enough sex. Likewise, any assertiveness or zealousness on behalf of a client is "bitchy." Task Force Survey, 2127.

In the Montana Task Force survey, 28 percent of females reported being subjected to sexual or suggestive comments, 17 percent by opposing legal counsel and 12 percent by a colleague in their own firm or office. The male indication of unwanted sexual advances was very low (0-4%).

The President's Commission on Women in the Profession reports one man calling the Commission and this Task Force "those whining women" and also reports that a male

partner presumed to apologize to another male attorney for his female colleague's objections to certain of the other male's discovery requests. "Sometimes she gets emotional," he offered by way of explanation, using the third person. She was able to make this report, because she was there, in the company of the two men, but treated as if she were not.

The Commission also reports that:

Women appear often to be judged by a harsher standard, as this story also shows. A woman in private practice for approximately ten years reported that an administrative hearings officer told her that two male attorneys had described her to the hearings officer as "mean". When the hearings officer asked them what they meant by that, they reportedly replied that she (the attorney) wouldn't give up, for example, when examining a hostile or adverse witness, that she was "pushy". The hearings officer's experience with the woman, as reported to the male attorneys, was that she was always well prepared, thorough and diligent. The male attorneys' perception of the preparedness, thoroughness and diligence was colored negatively as "meanness" and "pushiness".

Women attorneys often reflected on the "damned if you do, damned if you don't" routine to which they are subjected. Women, on the one hand called "bitch" and described in the harshest of terms, are at the same time described as "too soft" to be "real" lawyers or to be "tough" enough to litigate or to get a good settlement for a client or to handle the big money cases. Then, if they don't work on the "big money cases" or are not "tough" enough, they are deemed not partnership material or capable of advancement on a par with their male counterparts.

The findings of the various task forces and commissions around the nation overlap. They are disturbing findings, not only as to the stories just recounted here, but also as to the economic impact gender bias has on female attorneys and their clients. Across the nation, the task forces and commissions have found uniformly that female attorneys are less likely than their male counterparts to get lucrative case referrals or judicial appointments. They have found uniformly

that men get higher awards in actions involving wrongful death, loss of consortium and future earnings than do women. Gender bias creates economic disparity and that disparity is an injustice. As guardians of the only system of justice we have, all Montana practitioners have an obligation to end gender bias in the legal system.

President's Commission on Women in the Profession, Final Report, April 1994.

CIVIL DAMAGE AWARDS

Montana respondents were asked 11 questions regarding gender differences in personal injury and wrongful death settlements or awards, when other factors were equal.

In several instances, the respondents indicated strong stereotypical responses as to male-female differences. The results indicate that 53 percent of respondents believe that, with other factors being equal, males receive higher awards for loss of future earning capacity; 39 percent believe that female plaintiffs receive higher awards for disfigurement; 30 percent believe that female homemakers are more likely to recover economic value of lost services; 33 percent believe that males are found to have greater work life expectancy; and 21 percent believe that females receive higher awards for emotional distress.

Regarding attorney fee awards, 34 percent male and 36 percent female believe there is no difference if the client or the attorney is male or female, although 11 percent male and 16 percent female believe that male clients or attorneys account for higher attorney fee awards, and only three percent male and one percent female believe that female clients or attorneys account for higher awards. In addition, 50 percent believe that the gender of the attorney makes no difference in determining whether litigants are more likely to prevail in court, but 11 percent think they are more likely to prevail if the attorney is male.

DOMESTIC VIOLENCE BETWEEN ADULTS

Task Force responses to the survey about temporary restraining orders are disturbing. Of those who answered the questions, more than half stated that frequently, or almost always, mutual temporary restraining orders are ordered even if only one party

petitions for the order. More shocking is the fact that 80% of those who answered say that judges rarely or only sometimes sentence those convicted of misdemeanor violations of the orders to jail. We only asked eleven questions in this section of the survey, and thus only scratched the surface in this area.

One attorney who works in this area reports that:

The court system could play an important role in reducing domestic violence. The best deterrent is accountability and a clear message from the community that domestic violence is unacceptable and will not be tolerated in a civilized society. Unfortunately, this is not the message the courts carry. In a myriad of ways, the courts diffuse accountability and further the myth that the parties are in equal positions, so both are equally able to stop or prevent the violence. Such a message supports the batterer's rationalizations and justifications. The batterer already believes that the victim is to blame for the battering. The courts reinforce that belief and help ensure that the battering will happen again.

A legal system that does not take violence against women seriously actively supports and affirms the violence. Across the legal system, judges, attorneys, guardians ad litem treat it as the woman's fault, or not real, or something that does not really affect children, therefore irrelevant to custody determinations. They minimize its occurrence, its effects, and its significance.

When women get Orders of Protection from domestic violence or stalking, one judge regularly modifies the orders without notifying the woman supposedly protected to allow the man supposedly restrained to make contact with her. The judge undercuts the protection she thought she had, without notifying her.

In a case I did not observe, but heard about, a Deputy County Attorney appeared in Justice Court, asking the court to drop domestic abuse charges because the woman abused did not want to testify. The attorney asked the judge to order that the woman must reimburse the county for the costs of the prosecution so far and be restrained from ever calling 911

again. The judge refused, but the woman was in the courtroom to hear the attorney express his desire that she be punished for not cooperating with him.

These actions broadcast a clear message that the woman's experience does not matter, that she is the cause of the problem, that the effects of domestic violence are unimportant and temporary. The courts' inept and cavalier treatment of domestic violence disproportionately disadvantages women and is a particularly harmful form of gender bias.

Memo to Members of the Gender Fairness Task Force (Gender Bias in Family Law Subcommittee), November 28, 1995.

The Coordinator of the Montana Coalition Against Domestic Violence sent a long report to the Task Force concluding that:

From attitudes of those in the system which revictimize battered women and women who have been raped, to disregard for court orders meant to protect women, it is clear that gender bias exists in the courts of Montana. While this does not involve all court personnel or procedures, there is certainly enough of a problem to cause frustration, loss of legal rights and danger to women.

Letter from Lucille Pope, Coordinator, Montana Coalition Against Domestic Violence, February 15, 1988.

A commentator who wanted to remain anonymous because he regularly works with the people involved with his report, provided this information:

The way our society and the criminal justice system approach violence against women demonstrates gender bias. When a woman is assaulted by an intimate partner, many questions are focused on the victim: Why does she stay? What did she do to make him mad? Rarely is the question asked: Why was he violent?

When a man is an assault victim, we almost never look at his behavior before, during or after an assault. We simply

acknowledge that he has been victimized and that is inappropriate.

This stilted perspective continues through the court system. Often times sexual assault trials and domestic violence trials are turned into a circus of mud slinging at the victim, she is a drunk, she is a sleaze, and she isn't nice. The point of this victim character assassination is to divert the trier of fact from the item that needs attention, the violent act that generated the court action in the first place. Male victims of crime are rarely subjected to the same vicious personal attacks during the investigation or adjudication phases.

A woman in my community was sexually assaulted by her husband when he inserted a deodorant container into her vagina. He also beat her up. The county attorney and a deputy county attorney declined to prosecute the case. The county attorney said that he didn't think that what the husband did was an offense at all and it certainly wasn't a felony offense. The husband was ultimately charged with misdemeanor domestic abuse and misdemeanor sexual assault. The defendant did plead guilty before trial, so even the defendant felt that he had sexually assaulted his wife.

This victim had been drinking alcohol before the offense and had been out with another man. However, Montana does not have a justifiable use of rape statute nor any other legal or technical defense that says that because a victim has engaged in less than chaste behavior she is fair game for her husband to assault her sexually. That obviously is what the defendant and the county attorneys thought. If a man had suffered a similar degrading and intrusive assault everyone would have been horrified. No one would have asked what a male victim had done the night before, much less excused a violent assault as justified.

Frequently offenses that should be filed as a felony based on their severity or weapons used, are filed as misdemeanor charges when the victim is a woman intimate partner of the offender. The paradoxical result is that instead of taking violence against intimate partners more seriously than assaults

on strangers, violence against intimate partners is minimized and treated as no big deal.

Task Force survey respondents agree (combining frequently and almost always) that judges two-thirds of the time take into account the father's violence against the mother and only one-third of the time take into account the mother's violence against the father. They further answered that two-thirds of the judges are reluctant to award temporary attorney's fees, precluding an economically dependent spouse from pursuing litigation.

Quite significantly, of those who had opinions, two-thirds indicated that victim advocate programs frequently or almost always result in lower dismissal rates for domestic assault.

CRIMINAL SEXUAL CONDUCT

Two-thirds of those who answered the Task Force survey questions also reported that in sexual offense cases, defense attorneys appeal to gender stereotypes in order to discredit a female victim often or almost always; two-thirds of the respondents said that females charged with prostitution are frequently or almost always treated more harshly than males charged with soliciting prostitution; 75 percent reported that in sexual offense cases, sentences are frequently, often or almost always more lenient when the victim had a prior sexual relationship with the defendant.

Again, few questions were asked in this area, therefore, further research is warranted. Of those who responded two-thirds believe that frequently or almost always, in sexual offense cases, defense attorneys appeal to gender stereotypes to discredit a female victim.

In delinquency cases, half of those responding to the questions believe that female juveniles are treated more favorably by Montana courts while less than four percent believe males are treated more favorably, and two-thirds believe courts are more likely to set lower bail if the offender is female versus only 4 percent believing that to be true for males. Of those answering the questions, half believe male offenders are more likely to receive tougher treatment from attorneys and that judges are more likely to grant petitions to revoke suspended or deferred sentences for male offenders, versus only four percent believing those circumstances to be true for females. One-half believe that prosecutors are more likely to file petitions to revoke suspended or deferred sentences for male

offenders and 40 percent held that interfering with visitation is more likely to be prosecuted against a male parent.

The responses indicate that one-third have a perception that sex offenders receive tougher treatment from female attorneys, and 45 percent have the perception that sexual offense victims receive tougher treatment from male attorneys.

Some responses to the survey appear to be divided. Those include the fact that 33 percent believe frequently or almost always that the judges take into account ongoing safety needs of the victim when setting bail or conditions of release, but 22 percent believe that happens rarely or only sometimes. In sentencing, 28 percent believe judges take into account the safety of the victim, while 25 percent believe that happens rarely or only sometimes. The responses in this section were not collected by gender, therefore further study will be necessary in this area.

RECOMMENDATIONS

- Employers should deal with the problems women attorneys encounter directly, with knowledge and sensitivity toward employees, encouraging better staff relations overall through training and policies. The policies should include prohibitions against sexual harassment and a family-friendly leave policy.
- Employers might have a committee of several lawyers to deal with personnel issues, unless the firm is big, when an office manager would be employed, who should be able to speak freely and directly on behalf of the staff. A committee or office manager become acquainted with staff members and can develop a bridge between partners and other firm members.
- Employers should develop policies to reflect its practices so applicants for employment know what to expect from the firm. A firm has the right to insist on full-time partners or a certain number of billable hours but this information should be available up front.
- Employers should develop alternative forms of employment relationships which provide greater benefits than "at will," but something less than a full partnership for employees are unwilling or unable to work partnership schedules.

►Firms could develop forms of profit-sharing which provide for a portion of the income generated. This would be an extremely fair means of compensating both the very productive and the individual who is not on the same schedule. Since women tend to be high producers at times and low producers when their children are young, such an arrangement could be good for all.

The recommendations of the State Bar's President's Commission on Women in the Profession are exemplary in providing an understanding of the issues faces gender fairness in Montana's judicial system. Any new committee or future task force charged with implementing the recommendations of this Task Force should review Commission's recommendations and examine what has been accomplished.

EPILOGUE

There will be those who say the Montana Supreme Task Force simply wasted time and resources. Others will simply dismiss our Findings as evidence themselves of gender bias. On the other hand, it is the collective firm belief of the Task Force membership that the majority of the bench, bar and the public will interpret this Report as an accurate reflection of the present state of gender fairness in the justice system within Montana. The Task Force expects that many will view this report with a renewed enthusiasm for challenging Montana's justice system to reach toward gender equity with both hands. Gender fairness should be more than a dream. There is much work yet to be done.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 90-231

IN THE MATTER OF THE STATE BAR
OF MONTANA'S GENDER FAIRNESS
STEERING COMMITTEE

) O R D E R
)

The State Bar of Montana established a Gender Fairness Steering Committee to investigate the nature and extent of gender bias in the legal system of this State. The State Bar has petitioned this Court to create a Gender Fairness Task Force as further set forth in the State Bar of Montana's Petition in this proceeding dated April 25, 1990.

IT IS ORDERED:

1. There is hereby created a Gender Fairness Task Force whose general aim is to assist in promoting equality for men and women in the courts. The more specific goals of the Gender Fairness Task Force will be to examine the Montana legal system to identify gender bias, and, if found, to make recommendations for its elimination.

The Gender Fairness Task Force is thus charged with the duty to:

(a) Examine the extent to which gender bias, if it exists, affects decisionmaking in the courts of Montana.

(b) Review all aspects of the Montana judicial system, both substantive and procedural, and ascertain whether any statutes, rules, practices, or conduct work unfairness or undue hardship on members of either gender.

(c) Examine the extent to which gender bias, if it exists, affects participants in the judicial system, such as judges, attorneys, litigants, jurors, witnesses, court employees, and members of the public who come into contact with the courts of Montana.

(d) If gender bias exists, recommend means to eliminate its effect in the Montana judicial system.

(e) Perform such other duties as this Court may direct from time to time.

2. The members of the Gender Fairness Task Force shall be as follows:

Lucille Pope
Director, Coalition Against
Domestic Violence
60 Kuntz Court
Bozeman, MT 59715

Jane Lopp
American Association of
University Women
P.O. Box 1815
Kalispell, MT 59903

Hon. Dorothy McCarter
Judge of the District Court
Lewis & Clark Co. Courthouse
Helena, MT 59601

Honorable Marc Racicot
Attorney General
Justice Building
215 North Sanders
Helena, MT 59620

Klaus D. Sitte
Attorney at Law
Montana Legal Services
127 E. Main, Room 209
Missoula, MT 59802

Professor Bari Burke
Univ. of Mont. School of Law
Missoula, MT 59812

Max A. Hansen
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P.O. Box 1301
Dillon, MT 59725

Karla Gray
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Montana Power Company
40 East Broadway
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John B. Kuhr
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Havre, MT 59501

Honorable Diane G. Barz
Justice, Montana Supreme Court
Montana Supreme Court
215 North Sanders
Helena, MT 59620

Angela Russell
State Representative
P.O. Box 333
Lodge Grass, MT 59050

Karen Barclay
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Resources & Conservation
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Janice Frankino Doggett
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Helena, MT 59601

Mary E. "Merrilee" Duncan
Attorney at Law
2310 Fox Drive
Billings, MT 59102

3. The Clerk of this Court shall mail a true copy of this order to the President and Executive Director of the State Bar of Montana, to each member of the Gender Fairness Task Force, to the Clerks of the District Courts of this State, and a copy of this order shall be published in the Montana Lawyer.

DATED this 30th day of May, 1990.

J. A. Turner
Chief Justice

John J. Conaway
Harrison

Steve J. Barn

John L. Sheehan

William E. Hunter

J. D. Tolson
B.C. McDonald
Justices

APPENDIX B

**Montana Supreme Court Gender Fairness Task Force
Working Groups**

| | | |
|--|---|---|
| CHAIR: | Hon. Karla Gray Montana Supreme Court 215 North Sanders Helena, MT 59620 | Subcommittee Chair, Family Law |
| Klaus Sitte 304 North Higgins Missoula, MT 59802 | Max Hansen P.O. Box 1301 Dillon, MT 59725 | Sarah Arnott Ozment 325 East River Rd. HC 38 Box 628 Emigrant, MT 59027 |
| VICE-CHAIR: | Subcommittee Chair, Courthouse Interactions | Angela Russell Box 333 Lodge Grass, MT 59050 |
| Professor Bari Burke University of Montana School of Law Missoula, MT 59812 | Hon. Marge Johnson District Court Judge Cascade County Courthouse Great Falls, MT 59401 | STATE BAR BOARD OF TRUSTEES LIAISON: |
| MEMBERS: Karen Fagg MSE-HKM, Inc P.O. Box 31318 Billings, MT 59107 | John Kuhr P.O. Box 7152 Havre, MT 59501 | Edward F. Bartlett 40 East Broadway Butte, MT 59701 |
| Hon. Diane Barz District Court Judge P.O. Box 35029 Billings, MT 59107-5029 | Jane Lopp P.O. Box 7547 Kalispell, MT 59904 | OTHER INTERESTED PARTICIPANTS: Sherry Scheel Matteucci United States Attorney P.O. Box 1478 Billings, MT 59103 |
| Subcommittee Chair, Legal System Janice Doggett 1 South Montana Helena, MT 59601 | Hon. Joe Mazurek Attorney General 215 North Sanders Helena, MT 59620 | Hon. Dorothy McCarter Lewis & Clark County Courthouse 228 Broadway Helena, MT 59601 |
| Marilee Duncan P.O. Box 2529 Billings, MT 59103 | Jacqui Garcia 1236 N. 28th Street, #103 Billings, MT 59101 | |

APPENDIX C

LEGAL PRACTICE AND THE MONTANA JUDICIAL SYSTEM
A Survey of Montana Attorneys
1994

Summary Tables
of
Preliminary and Partial Results

Prepared by

Bureau of Business and Economic Research
The University of Montana
Missoula, Montana

July 1995

The following tables are labeled to reflect the sections of the questionnaire to which they pertain. They provide the preliminary response summaries for some but not all of the questionnaire items. For example, data from sections A and X are not included in this preliminary report; thus, there is no Table A nor Table X. Also, the tables for sections B, C, D, and G provide the results for some but not all the items included. The tables for sections E, F, and H include all the items from the questionnaire.

LEGAL PRACTICE AND THE MONTANA JUDICIAL SYSTEM

| | | | |
|----|---|-----------------|-------------|
| A. | Professional Background and Practice | | |
| B. | Own Firm (or Office/Agency) and its Hiring, Promotion, Assignment, and Related Practices | Tables B.1-B.2 | Pages 1-2 |
| C. | Demands and Other Aspects of a Law Career | Table C | Pages 3-4 |
| D. | Interaction in Court, in Chambers, and Elsewhere | Tables D.1-D.11 | Pages 5-18 |
| E. | Civil Damage Awards | Tables E.1-E.2 | Pages 19-20 |
| F. | Family Law | Table F | Pages 21-23 |
| G. | Domestic Violence between Adults | Table G | Page 24 |
| H. | Criminal Sexual Conduct | Tables H.1-H.2 | Pages 25-26 |
| X. | Respondent Demographics | | |

Table B.1
Survey of Montana Attorneys (1994)
PRACTICES WITHIN OWN FIRM, AGENCY, OR OFFICE
Preliminary Data

| | <u>Males</u> (n=97) | <u>Females</u> (n=140) | <u>All</u> <u>Respondents</u> (n=237) |
|--|------------------------|---------------------------|---|
|--|------------------------|---------------------------|---|

When it comes to hiring new associates (or hiring for comparable entry level positions in other organizations), which of the following best reflects the situation in your firm or office?

| | | |
|---|-----|-----|
| Men have a better chance than women | 4% | 16% |
| Men and women have an equal chance | 64% | 50% |
| Women have a better chance than men | 10% | 5% |
| Other response (undecided, no opinion, other) | 22% | 29% |

Which of the following best reflects the situation in your firm/office with regard to promotion to partner (or promotion to comparable senior positions in other organizations)?

| | | |
|---|-----|-----|
| Men have a better chance than women | 1% | 13% |
| Men and women have an equal chance | 62% | 34% |
| Women have a better chance than men | 0% | 1% |
| Other response (undecided, no opinion, other) | 34% | 41% |

^aLess than 0.5%

Table B.2
 Survey of Montana Attorneys (1994)
PRACTICES WITHIN OWN FIRM, AGENCY, OR OFFICE
Preliminary Data

When considering candidates for new associates (or for comparable entry level positions in other organizations) -- generally speaking, how often, if at all, do staff inquire into, discuss, or take into account the applicants' personal relationships, family obligations, or other personal commitments? (n=236)

| | |
|---|-----|
| Rarely or never | 36% |
| Only sometimes | 15% |
| Frequently, quite often | 7% |
| Almost always | 8% |
| Other response (undecided, no opinion, other) | 33% |

If the issue of a candidate's sexual orientation arose in the hiring process, to what extent, if at all, would it influence the final hiring decision? (n=236)

| | |
|---|-----|
| Considerably | 11% |
| Somewhat | 14% |
| Not too much | 10% |
| Not at all | 36% |
| Other response (undecided, no opinion, other) | 29% |

Table C

Survey of Montana Attorneys (1994)

DEMANDS AND OTHER ASPECTS OF A LAW CAREER

Preliminary Data

What effect, if any, has your gender had in the following environments or circumstances:

| | | <u>Negative</u> | <u>No Effect</u> | <u>Positive</u> | <u>DK/Other</u> |
|--|--|-----------------|------------------|-----------------|-----------------|
| (A) Your relationships with other attorneys in your firm/office | | 17% | 38% | 10% | 35% |
| Males | | 2% | 38% | 7% | 53% |
| Females | | 27% | 38% | 13% | 22% |
| (B) Your relationships with other attorneys outside your firm/office | | 27% | 37% | 7% | 29% |
| Males | | 3% | 42% | 9% | 45% |
| Females | | 44% | 33% | 5% | 18% |
| (C) Referrals of cases from other attorneys | | 15% | 35% | 5% | 45% |
| Males | | 3% | 38% | 7% | 52% |
| Females | | 23% | 32% | 4% | 41% |
| (D) Referrals of complex cases from other attorneys or association with other attorneys on complex cases | | 19% | 33% | 4% | 44% |
| Males | | 3% | 41% | 5% | 51% |
| Females | | 29% | 27% | 4% | 40% |
| (E) Your likelihood of being assigned a complex case | | 12% | 44% | 2% | 42% |
| Males | | 2% | 43% | 3% | 52% |
| Females | | 19% | 44% | 1% | 36% |

Table C (*Continued*)
 Survey of Montana Attorneys (1994)
 DEMANDS AND OTHER ASPECTS OF A LAW CAREER
Preliminary Data

What effect, if any, has your gender had in the following environments or circumstances:

| | | <u>Negative</u> | <u>No Effect</u> | <u>Positive</u> | <u>DK/Other</u> |
|---|---------|-----------------|------------------|-----------------|-----------------|
| (F) Your likelihood of being assigned a high-profile case | | 14% | 40% | 4% | 42% |
| | Males | 1% | 43% | 4% | 52% |
| | Females | 24% | 38% | 4% | 35% |
| (G) Your likelihood of being assigned a federal case | | 7% | 45% | 1% | 47% |
| | Males | 1% | 45% | 2% | 52% |
| | Females | 11% | 44% | 1% | 44% |
| (H) Your likelihood of being assigned a case/project requiring out-of-town travel | | 7% | 51% | 1% | 41% |
| | Males | 0% | 45% | 2% | 53% |
| | Females | 11% | 54% | 1% | 34% |
| (I) Your office or office space assignment | | 8% | 52% | 2% | 38% |
| | Males | 1% | 45% | 0% | 54% |
| | Females | 13% | 56% | 3% | 28% |
| (J) Your rate of promotion | | 16% | 43% | 1% | 40% |
| | Males | 1% | 44% | 0% | 55% |
| | Females | 26% | 42% | 2% | 29% |

Table D.1

Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE

Preliminary Data

| | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|--|-----------------------|-------------------|----------------------|------------------|-----------------------|
| D1. Judges or attorneys according less credibility to a female, than to a male, who testifies as an expert witness on a subject in a traditionally male-dominated field. | 26% | 18% | 14% | 5% | 37% |
| D2. Judges or attorneys according less credibility to female counsel, than to male counsel, who is an aggressive advocate. | 31% | 24% | 25% | 6% | 14% |
| D3. Judges or attorneys according less credibility to a female witness, than to a male, who is emotional on the stand. | 25% | 23% | 20% | 9% | 23% |
| D4. Female counsel being subjected to verbal or physical sexual harassment by judges. | 56% | 23% | 5% | 2% | 15% |
| D5. Female counsel being subjected to verbal or physical sexual harassment by male counsel. | 43% | 30% | 12% | 2% | 12% |
| D6. Female counsel being subjected to verbal or physical sexual harassment by court personnel. | 70% | 10% | 2% | 1% | 17% |
| D7. Judges intervening to stop demeaning comments or behavior when they occur in the court or in chambers. | 31% | 13% | 10% | 9% | 36% |

Table D.1 (Continued)
 Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE

Preliminary Data

| | | Rarely or Never | | | | | Only Sometimes | | | | | Frequently; Often | | | | | Almost Always | | | Undecided or Other | | |
|------|--|-----------------|-----|-----|----|-----|----------------|-----|-----|----|-----|-------------------|-----|-----|----|-----|---------------|-----------------|-------------------------|--------------------|--|--|
| | | 41% | 22% | 20% | 6% | 12% | 35% | 25% | 22% | 7% | 11% | 36% | 25% | 19% | 6% | 13% | Males (n=97) | Females (n=140) | All Respondents (n=237) | | | |
| D8. | Male counsel addressing female counsel less formally than they address other male counsel (e.g., using first names or terms of endearment) in court or in other formal proceedings. | | | | | | | | | | | | | | | | | | | | | |
| D9. | Male counsel addressing female counsel less formally than other male counsel (e.g., using first names or terms of endearment) in off-the-record proceedings with the judge, such as discussions in chambers. | | | | | | | | | | | | | | | | | | | | | |
| D10. | Male counsel addressing female litigants or witnesses less formally in court or in other formal proceedings. | | | | | | | | | | | | | | | | | | | | | |

General opinion about the type of behavior discussed in D8-D10 above:

- Is just a traditional way of treating women and does not reflect gender bias. 4% 0% 2%
- Is a fairly traditional way of treating women and any gender bias is not intentional. 11% 9% 10%
- Is a form of gender bias, but it has little or no impact on the legal process. 18% 12% 14%
- Is a form of gender bias that can adversely affect the outcome of the case and undermine counsel's credibility. 24% 63% 47%
- Other response (undecided, no opinion, or other) 43% 16% 27%

Table D.2
Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE
Preliminary Data

| | | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|------|---|--------------------|-------------------|----------------------|------------------|------------------------|
| D12. | Male counsel making comments about the physical appearance or dress of female counsel, while in court or in chambers. | 40% | 36% | 10% | 2% | 12% |
| D13. | Court employees making comments about the physical appearance or dress of female counsel, while in court or in chambers. | 50% | 24% | 6% | 1% | 19% |
| D14. | Male counsel or court employees making comments about the physical appearance or dress of female litigants or witnesses, while in court or in chambers. | 38% | 34% | 12% | 1% | 14% |
| D15. | Male counsel or court employees making comments about the physical appearance or dress of female court personnel, while in court or in chambers. | 48% | 28% | 5% | 1% | 18% |
| | | | | | All | |
| | | | | | Males (n=97) | Females (n=140) |
| | | | | | | Respondents (n=237) |
| | General opinion about the type of behavior discussed above: | | | | | |
| | Is just a traditional way of treating women and does not reflect gender bias. | | | | 8% | 1% |
| | Is a fairly traditional way of treating women and any gender bias is not intentional. | | | | 11% | 7% |
| | Is a form of gender bias, but it has little or no impact on the legal process. | | | | 25% | 21% |
| | Is a form of gender bias that can adversely affect the outcome of the case and undermine counsel's credibility. | | | | 19% | 53% |
| | Other response (undecided, no opinion, or other) | | | | 37% | 18% |
| | | | | | | 39% |
| | | | | | | 26% |

Table D.3
Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE

Preliminary Data

| | | Preliminary Data | | | | All Respondents (n=237) |
|------|--|--------------------|-------------------|----------------------|------------------|-------------------------------|
| | | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | |
| D17. | Male counsel making comments of a sexual or suggestive nature to female counsel while in court or in chambers. | 68% | 15% | 3% | 0% | 15% |
| D18. | Court employees making comments of a sexual or suggestive nature to female counsel while in court or in chambers. | 75% | 8% | 0% | 0% | 17% |
| D19. | Male counsel or court employees making comments of a sexual or suggestive nature to female litigants or witnesses while in court or in chambers. | 68% | 13% | 1% | 0% | 18% |
| D20. | Male counsel or court employees making comments of a sexual or suggestive nature to female court personnel while in court or in chambers. | 66% | 15% | 1% | 0% | 18% |
| | | | | | | All Males (n=97) |
| | | | | | | Females (n=140) |

General opinion about the type of behavior discussed above in a court setting:

- Is just a common pattern of male behavior and does not reflect gender bias. 1% 0% 0%^a
- Is a fairly common pattern of male behavior and any gender bias is not intentional. 4% 4% 4%
- Is a form of gender bias, but it has little or no impact on the legal process. 16% 5% 9%
- Is a form of gender bias that imposes a special burden on female counsel relative to their male counterparts. 33% 70% 55%
- Other response (undecided, no opinion, or other) 45% 21% 32%

^aLess than 0.5%

Table D.4

Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE

Preliminary Data

General opinion about the type of behavior discussed above:

Is just part of the adversarial process and does not reflect gender bias.

Is just part of the adversarial process and any gender bias is not intentional

Is a form of gender bias but it has little or no impact on the legal process

Yield curves of secondary bonds that increase a financial burden on financial accounts relative to

As a result of gender bias that imposes a special stigma on their male counterparts.

Other response (undecided/no opinion or other)

Table D.5

Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE

Preliminary Data

| | | Preliminary Data | | | | | All Respondents (n=237) | | |
|------|--|--------------------|-------|-------------------|-------------|------------------|----------------------------|-----------------|-------------------------------|
| | | Rarely or Never | Often | Only Sometimes | Frequently; | Almost Always | Undecided or Other | | |
| D28. | Male counsel cutting off or ignoring female counsel's argument or comments during off-the-record proceedings involving the judge, such as discussions in chambers. | 35% | 25% | 22% | 5% | 5% | 13% | | |
| D29. | Male counsel cutting off or ignoring female counsel's argument or comments during case-related discussions NOT involving the judge, such as settlement negotiations. | 33% | 22% | 27% | 5% | 5% | 13% | | |
| D30. | Male counsel cutting off or ignoring female counsel's argument or comments in less formal professional settings or gatherings. | 29% | 27% | 27% | 6% | 6% | 11% | | |
| | | | | | | | | Males (n=97) | Females (n=140) |
| | | | | | | | | | All Respondents (n=237) |

General opinion about the type of behavior discussed above:

- Is just part of the adversarial process and does not reflect gender bias. 13% 3% 7%
- Is just part of the adversarial process and any gender bias is not intentional. 5% 2% 3%
- Is a form of gender bias, but it has little or no impact on the legal process. 10% 5% 7%
- Is a form of gender bias that imposes a special burden on female counsel relative to their male counterparts. 25% 76% 55%
- Other response (undecided, no opinion, or other) 46% 14% 28%

Table D.6
Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE
Preliminary Data

| Frequency of behavior by FEDERAL judges (n=236): | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|---|-----------------|----------------|-------------------|---------------|--------------------|
| (A) Addressing female counsel in a less formal or professional manner than they address male counsel. | 42% | 6% | 3% | 1% | 48% |
| (B) Favoring, or appearing to favor, female counsel seemingly because she is a woman. | 44% | 6% | 1% | 0% | 50% |
| (C) Making comments to female counsel of a suggestive or sexual nature, while in court or in chambers. | 49% | 2% | 0% | 0% | 49% |
| (D) Singling out women for disparaging or demeaning remarks about their professional competence or performance as attorneys, in the course of court business. | 42% | 7% | 2% | 1% | 48% |
| (E) Cutting off women attorneys while they are speaking, while permitting male attorneys more time to make their point, during formal court proceedings or in off-the-record proceedings in chambers. | 34% | 10% | 6% | 2% | 49% |
| (F) Being stricter with female counsel, seemingly because she is a woman. | 39% | 7% | 5% | 1% | 48% |
| (G) Intervening to stop demeaning comments or behavior when they occur in court or in chambers. | 26% | 6% | 3% | 6% | 60% |

Table D.7

Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE

Preliminary Data

| | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|---|--------------------|-------------------|----------------------|------------------|-----------------------|
| Frequency of behavior by STATE judges (n=236): | | | | | |
| (A) Addressing female counsel in a less formal or professional manner than they address male counsel. | 49% | 28% | 11% | 2% | 10% |
| (B) Favoring, or appearing to favor, female counsel seemingly because she is a woman. | 67% | 20% | 1% | 0% | 13% |
| (C) Making comments to female counsel of a suggestive or sexual nature, while in court or in chambers. | 75% | 8% | 1% | 0% | 15% |
| (D) Singling out women for disparaging or demeaning remarks about their professional competence or performance as attorneys, in the course of court business. | 63% | 18% | 6% | 1% | 11% |
| (E) Cutting off women attorneys while they are speaking, while permitting male attorneys more time to make their point, during formal court proceedings or in off-the-record proceedings in chambers. | 51% | 19% | 16% | 3% | 11% |
| (F) Being stricter with female counsel, seemingly because she is a woman. | 56% | 18% | 11% | 2% | 12% |
| (G) Intervening to stop demeaning comments or behavior when they occur in court or in chambers. | 44% | 13% | 6% | 7% | 30% |

Table D.8

Survey of Montana Attorneys (1994)

INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE

Preliminary Data

| | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|--|--------------------|-------------------|----------------------|------------------|-----------------------|
| Frequency of behavior by other COURT EMPLOYEES (n=236): | | | | | |
| (A) Addressing female counsel in a less formal or professional manner than they address male counsel. | 52% | 20% | 11% | 2% | 16% |
| (B) Showing favoritism toward <u>male</u> attorneys in setting and managing schedules, processing papers, etc. | 56% | 12% | 9% | 3% | 20% |
| (C) Showing favoritism toward <u>female</u> attorneys in setting and managing schedules, processing papers, etc. | 64% | 14% | 3% | 0% | 19% |

Table D.9
Survey of Montana Attorneys (1994)
INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE
Preliminary Data

In your experience and judgment, would you say male counsel or female counsel tend to be better at any of the following?

| | <u>Male Counsel</u> | <u>Female Counsel</u> | <u>No Difference</u> | <u>Undecided or Other</u> |
|---|-------------------------|---------------------------|--------------------------|-------------------------------|
| In your experience and judgment, who tends to be better at: | | | | |
| (A) Reaching a settlement? | 8% | 24% | 65% | 3% |
| Males | 13% | 7% | 75% | 4% |
| Females | 4% | 35% | 59% | 3% |
| (B) Negotiating deals? | 16% | 12% | 68% | 4% |
| Males | 18% | 2% | 75% | 5% |
| Females | 16% | 19% | 63% | 3% |
| (C) Assertive representation of clients' interests? | 6% | 6% | 85% | 3% |
| Males | 6% | 3% | 88% | 3% |
| Females | 6% | 8% | 84% | 3% |
| (D) "Rainmaking"? | 42% | 2% | 45% | 11% |
| Males | 31% | 3% | 54% | 12% |
| Females | 50% | 1% | 39% | 10% |
| (E) Arguing complicated issues of law? | 2% | 7% | 87% | 3% |
| Males | 3% | 0% | 94% | 3% |
| Females | 2% | 11% | 83% | 4% |
| (F) Not letting personal emotions interfere with their lawyering? | 18% | 6% | 73% | 4% |
| Males | 24% | 2% | 70% | 4% |
| Females | 14% | 8% | 75% | 4% |
| (G) Being a "heavy hitter"? | 28% | 3% | 61% | 8% |
| Males | 19% | 2% | 70% | 9% |
| Females | 34% | 4% | 55% | 7% |
| (H) Careful case preparation? | 1% | 27% | 70% | 3% |
| Males | 2% | 11% | 84% | 3% |
| Females | 0% | 37% | 60% | 3% |

Table D.9 *(Continued)*
 Survey of Montana Attorneys (1994)
 INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE
Preliminary Data

In your experience and judgment, would you say male counsel or female counsel tend to be better at any of the following?

| | | Male Counsel | Female Counsel | No Difference | Undecided or Other |
|---|--|-----------------|-------------------|------------------|-----------------------|
| In your experience and judgment, who tends to be better at: | | | | | |
| (I) Client control? | | 13% | 10% | 74% | 3% |
| Males | | 19% | 1% | 76% | 4% |
| Females | | 9% | 16% | 72% | 3% |
| (J) Handling a high-profile case? | | 6% | 2% | 88% | 4% |
| Males | | 8% | 0% | 87% | 5% |
| Females | | 4% | 4% | 89% | 3% |
| (K) Getting jury sympathy for clients? | | 6% | 11% | 77% | 6% |
| Males | | 3% | 6% | 84% | 7% |
| Females | | 7% | 15% | 73% | 5% |
| (L) Mentoring associates and more junior partners? | | 9% | 22% | 63% | 6% |
| Males | | 10% | 7% | 76% | 6% |
| Females | | 8% | 32% | 54% | 6% |
| (M) Being a good team player? | | 6% | 25% | 66% | 4% |
| Males | | 9% | 9% | 76% | 5% |
| Females | | 3% | 35% | 59% | 3% |

Table D.10
Survey of Montana Attorneys (1994)
INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE
Preliminary Data

All in all -- considering any possible gender differences in practice style and whatever effects the gender composition of the bench may have -- as a practical matter, would you say the clients in the following circumstances would be better served by male counsel or female counsel, assuming they have comparable experience in that specialty area?

| | <u>Male Counsel</u> | <u>Female Counsel</u> | <u>No Difference</u> | <u>Undecided or Other</u> |
|--|-------------------------|---------------------------|--------------------------|-------------------------------|
| As a practical matter, who would better serve . . . | | | | |
| (A) A male criminal defendant? | 11% | 9% | 74% | 7% |
| Males | 14% | 7% | 74% | 4% |
| Females | 8% | 10% | 74% | 9% |
| (B) A party in a high stakes business dispute? | 19% | 1% | 75% | 5% |
| Males | 19% | 0% | 77% | 4% |
| Females | 19% | 1% | 74% | 6% |
| (C) A plaintiff in a personal injury suit? | 8% | 5% | 82% | 5% |
| Males | 6% | 3% | 87% | 4% |
| Females | 9% | 6% | 79% | 6% |
| (D) A corporate defendant in a personal injury suit? | 10% | 7% | 78% | 5% |
| Males | 6% | 9% | 80% | 4% |
| Females | 13% | 6% | 75% | 6% |
| (E) A corporation in a Chapter 11 bankruptcy proceeding? | 8% | 1% | 85% | 6% |
| Males | 2% | 0% | 93% | 5% |
| Females | 11% | 1% | 80% | 7% |
| (F) An individual in a consumer bankruptcy proceeding? | 4% | 4% | 85% | 7% |
| Males | 1% | 2% | 91% | 6% |
| Females | 6% | 5% | 81% | 7% |
| (G) A female plaintiff in an employment discrimination suit? | 27% | 9% | 58% | 6% |
| Males | 23% | 8% | 64% | 5% |
| Females | 30% | 10% | 54% | 6% |

Table D.10 (*Continued*)
 Survey of Montana Attorneys (1994)
 INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE
Preliminary Data

All in all -- considering any possible gender differences in practice style and whatever effects the gender composition of the bench may have -- as a practical matter, would you say the clients in the following circumstances would be better served by male counsel or female counsel, assuming they have comparable experience in that specialty area?

| | <u>Male Counsel</u> | <u>Female Counsel</u> | <u>No Difference</u> | <u>Undecided or Other</u> |
|--|-------------------------|---------------------------|--------------------------|-------------------------------|
| As a practical matter, who would better serve . . . | | | | |
| (H) A male plaintiff in an employment discrimination suit? | 8% | 26% | 60% | 6% |
| Males | 5% | 23% | 67% | 5% |
| Females | 9% | 29% | 56% | 6% |
| (I) A female criminal defendant? | 13% | 14% | 67% | 6% |
| Males | 14% | 16% | 64% | 4% |
| Females | 11% | 12% | 69% | 8% |
| (J) A social security disability claimant? | 2% | 9% | 83% | 6% |
| Males | 2% | 6% | 88% | 4% |
| Females | 3% | 11% | 79% | 6% |

Table D.11
 Survey of Montana Attorneys (1994)
 INTERACTION IN COURT, IN CHAMBERS, AND ELSEWHERE
Preliminary Data

| | Males (n=97) | Females (n=140) | All Respondents (n=237) |
|--|-----------------|--------------------|-------------------------------|
| In your own experience in legal practice, uncivil behavior between opposing counsel is <u>more likely</u> to occur: | | | |
| When male counsel opposes female counsel | 3% | 31% | 20% |
| When male counsel opposes male counsel | 28% | 14% | 19% |
| When female counsel opposes female counsel | 4% | 6% | 5% |
| Occurrence has nothing to do with gender of counsel | 60% | 41% | 49% |
| Other response (undecided, no opinion, or other) | 5% | 8% | 7% |
| In last three years in legal practice, was subjected to unwanted sexual advances or other forms of sexual harassment by: | | | |
| (A) A federal judge | 0% | 0% | 0% |
| (B) Other federal court personnel | 0% | 1% | 0% ^a |
| (C) An opposing legal counsel | 1% | 17% | 10% |
| (D) A colleague in own firm/office | 2% | 12% | 8% |
| (E) A client | 4% | 28% | 18% |

^aLess than 0.5%

Table E.1

Survey of Montana Attorneys (1994)
 CIVIL DAMAGE AWARDS
Preliminary Data

The following items refer to personal injury and wrongful death settlements or awards.

| | <u>Male</u> | <u>Female</u> | <u>No Difference</u> | <u>Undecided or Other</u> |
|---|-------------|---------------|--------------------------|-------------------------------|
| E1. Other factors being equal, plaintiffs tend to receive higher awards for disfigurement if they are: | 3% | 36% | 14% | 47% |
| E2. Other factors being equal, plaintiffs tend to receive higher awards for pain and suffering if they are: | 11% | 11% | 32% | 46% |
| E3. Other factors being equal, plaintiffs tend to receive higher awards for emotional distress if they are: | 7% | 21% | 25% | 47% |
| E4. Other factors being equal, plaintiffs receive higher awards for loss of future earning capacity if they are: | 53% | 0% | 12% | 34% |
| E5. Other factors being equal, plaintiffs are usually found to have greater worklife expectancy if they are: | 33% | 11% | 15% | 41% |
| E6. Other factors being equal, litigants are more likely to prevail in court if their <u>attorney</u> is: | 11% | 0% | 50% | 39% |
| E7. In personal injury and other cases involving damages, <u>homemakers</u> (or their personal representatives) are more likely to recover the economic value of their lost services if they are: | 8% | 30% | 14% | 48% |
| E8. Other factors being equal, attorney fee awards are generally higher if the <u>client</u> is: | 11% | 3% | 34% | 51% |
| E9. Other factors being equal, attorney fee awards are generally higher if the <u>attorney</u> is: | 16% | 1% | 36% | 48% |

Table E.2
 Survey of Montana Attorneys (1994)
 CIVIL DAMAGE AWARDS
Preliminary Data

| | | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|------|--|--------------------|-------------------|----------------------|------------------|-----------------------|
| E10. | Other factors being equal, women employed outside the home receive higher amounts for pain and suffering than homemakers do. | 8% | 7% | 12% | 4% | 68% |
| E11. | Other factors being equal, husbands receive higher amounts for loss of consortium than wives do. | 10% | 6% | 12% | 2% | 70% |

Table F
 Survey of Montana Attorneys (1994)
FAMILY LAW
Preliminary Data

| | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|---|--------------------|-------------------|----------------------|------------------|-----------------------|
| F1. When a wife's primary contribution has been as a homemaker, judges view the husband's income-producing contribution as entitling him to a larger share of the marital property. | 22% | 18% | 16% | 4% | 39% |
| F2. In awarding maintenance, judges have a realistic understanding of the likelihood of the economically dependent spouse finding adequate employment. | 13% | 27% | 17% | 8% | 35% |
| F3. The courts adequately enforce maintenance awards. | 18% | 20% | 11% | 7% | 44% |
| F4. Judges are willing to exercise their civil contempt powers to enforce child support orders. | 21% | 16% | 15% | 10% | 38% |
| F5. Judges refrain from enforcing child support when visitation problems exist. | 21% | 22% | 13% | 1% | 42% |
| F6. Enforcement of child support awards is delayed when there are counterclaims for custody. | 11% | 15% | 21% | 6% | 47% |
| F7. Judges willingly enforce the current child support guidelines and rules. | 5% | 13% | 18% | 27% | 37% |
| F8. In awarding custody, judges seem to assume that children belong with their mothers. | 7% | 22% | 27% | 10% | 34% |
| F9. In awarding custody, judges favor the parent in the stronger financial position. | 16% | 33% | 8% | 2% | 39% |

Table F (Continued)
 Survey of Montana Attorneys (1994)
 FAMILY LAW
Preliminary Data

| | | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|------|---|--------------------|-------------------|----------------------|------------------|-----------------------|
| F10. | In awarding custody, judges take into account the father's <u>violence</u> against the mother. | 6% | 17% | 22% | 18% | 37% |
| F11. | In awarding custody, judges take into account the <u>mother's violence</u> against the father. | 14% | 23% | 16% | 7% | 41% |
| F12. | Judges award joint <u>legal</u> custody despite the objections of one or both parents. | 3% | 13% | 32% | 11% | 41% |
| F13. | Judges award joint <u>physical</u> custody despite the objections of one or both parents. | 12% | 23% | 19% | 6% | 41% |
| F14. | In cases having a history of domestic violence, judges strongly encourage the parties to negotiate child custody determinations. | 10% | 15% | 18% | 5% | 52% |
| F15. | If the mother is employed and the father has married a "stay-at-home" stepmother, child custody is awarded, or modified and awarded, to the father. | 11% | 29% | 9% | 0% | 51% |
| F16. | The reluctance of courts to award temporary attorney fees in family law cases precludes the economically dependent spouse from pursuing the litigation. | 6% | 12% | 25% | 12% | 45% |
| F17. | The reluctance of courts to award temporary attorney fees in family law cases precludes <u>me</u> from taking family law cases. | 18% | 8% | 9% | 4% | 61% |
| F18. | Attorney fee awards in family law cases are high enough to allow the economically dependent spouse to pursue the litigation. | 28% | 15% | 5% | 4% | 49% |

Table F (*Continued*)
 Survey of Montana Attorneys (1994)

FAMILY LAW

Preliminary Data

| | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other |
|---|--------------------|-------------------|----------------------|------------------|-------------------------------|
| | <u>Agree</u> | <u>Disagree</u> | | | <u>Undecided or Other</u> |
| F19. The reluctance of courts to award attorney fees in litigation to modify child support awards precludes <u>me</u> from taking such cases. | 19% | 10% | 7% | 5% | 59% |
| F20. In <u>my</u> practice, a retainer fee is required for family law cases. | 7% | 4% | 10% | 25% | 55% |
| | | | | | |
| F21. Family law is regarded as lower status work in the practice of law. | 80% | 9% | 9% | 11% | |
| F22. The financial rewards are low in family law. | 73% | 12% | 12% | 15% | |
| F23. The emotional rewards are low in family law. | 57% | 22% | 22% | 21% | |

Table G
Survey of Montana Attorneys (1994)
DOMESTIC VIOLENCE BETWEEN ADULTS

| | <i>Preliminary Data</i> | | | | | |
|---|-------------------------|-------------------|----------------------|------------------|-----------------------|--|
| | Rarely or Never | Only Sometimes | Frequently; Often | Almost Always | Undecided or Other | |
| G1. Mutual Temporary Restraining Orders (TROs) are ordered even when only one party has petitioned for the order. | 11% | 14% | 18% | 9% | 47% | |
| G2. Judges sentence convicted misdemeanor violators of TROs to jail. | 22% | 20% | 8% | 3% | 46% | |
| G3. During TRO proceedings, judges give serious consideration to requests for supervised visitation. | 6% | 21% | 19% | 6% | 47% | |
| G4. Court personnel discourage potential petitioners from seeking TROs. | 29% | 9% | 6% | 2% | 54% | |
| G5. Montana policy, with a preference for arrest, results in police charging defendants with domestic assault without probable cause. | 26% | 16% | 7% | 3% | 47% | |
| G6. In <u>setting bail</u> or conditions of release, judges take into account the ongoing safety needs of the victim. | 8% | 14% | 20% | 13% | 45% | |
| G7. In <u>sentencing</u> those convicted of domestic assault, judges take into account the ongoing safety needs of the victim. | 11% | 14% | 17% | 11% | 46% | |
| G8. The attitudes of <u>prosecutors</u> discourage victim cooperation in domestic assault cases. | 25% | 16% | 8% | 3% | 47% | |
| G9. The attitudes of <u>judges</u> discourage victim cooperation in domestic assault cases. | 25% | 19% | 6% | 2% | 47% | |
| G10. Victim advocate programs, such as shelter/advocate programs, result in lower dismissal rates for domestic assault prosecutions. | 4% | 10% | 21% | 7% | 58% | |
| G11. Judges are reluctant to use criminal sanctions as a remedy for domestic violence. | 16% | 15% | 16% | 9% | 43% | |

Table H.1
 Survey of Montana Attorneys (1994)
 CRIMINAL SEXUAL CONDUCT
Preliminary Data

| | <u>Rarely or Never</u> | <u>Sometimes</u> | <u>Often</u> | <u>Frequently;</u> <u>Often</u> | <u>Almost Always</u> | <u>Always</u> | <u>Undecided or Other</u> |
|---|----------------------------|------------------|--------------|------------------------------------|--------------------------|---------------|-------------------------------|
| H1. Sentencing alternatives for juvenile offenders, including correctional facilities, are equally available for members of both sexes. | 14% | 9% | 8% | 8% | 12% | 52% | 60% |
| H2. In sexual offense cases, judges control the courts so as to protect the complaining witness from improper questioning. | 6% | 14% | 17% | 17% | 12% | 52% | |
| H3. In sexual offense cases, sentences are more lenient when the victim had a prior sexual relationship with the defendant than when there was no such relationship. | 3% | 9% | 22% | 22% | 8% | 57% | |
| H4. In sexual offense cases, defense attorneys appeal to gender stereotypes in order to discredit a female victim (for example, "women say no when they mean yes, or "provocative dress is an invitation," and the like). | 5% | 14% | 20% | 20% | 13% | 48% | |
| H5. Male and female attorneys treat sexual offense <u>victims</u> differently. | 10% | 13% | 14% | 14% | 10% | 53% | |
| H6. Male and female attorneys treat sexual <u>offenders</u> differently. | 11% | 16% | 13% | 13% | 6% | 54% | |
| H7. Courts tend to impose a stricter sentence on a male offender in a sexual offense case if the victim is a <u>family member</u> . | 10% | 13% | 10% | 10% | 5% | 62% | |
| H8. Courts tend to impose a stricter sentence on a male offender if the victim was previously unknown to the offender. | 3% | 13% | 16% | 16% | 8% | 59% | |
| H9. Females charged with prostitution are treated more harshly than males charged with soliciting prostitution. | 4% | 5% | 10% | 10% | 13% | 69% | |

Table H.2
 Survey of Montana Attorneys (1994)
 CRIMINAL SEXUAL CONDUCT
Preliminary Data

| | <u>Male</u> | <u>Female</u> | <u>No Difference</u> | <u>Undecided or Other</u> |
|---|-------------|---------------|--------------------------|-------------------------------|
| H10. In <u>delinquency</u> cases, Montana courts tend to treat juvenile offenders more favorably if they are: | 2% | 24% | 17% | 56% |
| H11. In <u>status</u> cases, Montana courts tend to treat juvenile offenders more favorably if they are: | 4% | 13% | 24% | 60% |
| H12. Montana courts tend to treat male adult offenders more favorably when the juvenile victim is: | 10% | 6% | 28% | 57% |
| H13. Courts are more likely to grant release on recognizance, or to set a lower bail, when the offender is: | 2% | 33% | 15% | 50% |
| H14. Sex offenders tend to receive tougher treatment from <u>attorneys</u> who are: | 3% | 16% | 29% | 51% |
| H15. Sexual offense <u>victims</u> tend to receive tougher treatment from attorneys who are: | 22% | 2% | 26% | 50% |
| H16. Courts tend to impose a stricter sentence on a male offender in a sexual offense case if the victim is: | 11% | 11% | 25% | 54% |
| H17. In preparing presentence reports, probation officers tend to treat <u>offenders</u> more harshly who are: | 17% | 2% | 20% | 61% |
| H18. Prosecutors are more likely to file petitions to revoke a suspended or deferred sentence for an offender who is: | 21% | 2% | 22% | 55% |
| H19. Judges are more likely to grant petitions to revoke a suspended or deferred sentence for an offender who is: | 22% | 2% | 21% | 55% |
| H20. The offense of interfering with visitation is more likely to be prosecuted against a parent who is: | 20% | 14% | 18% | 49% |

Montana Gender Fairness Task Force

REPORT ON
SURVEY OF MONTANA ATTORNEYS (1994)

Survey Response Rate:

97/250 male attorneys (38%)
140/250 female attorneys (56%)

Comments and Anecdotes

38/97 male respondents wrote comments
79/140 female respondents wrote comments

Comments of Male Respondents

Several male respondents were hostile to a survey of possible gender bias in the judicial system.¹

"If State Bar dollars are used to fund this survey, I protest the waste of my money!" 1023 (39 years old)

"My opinion is that this survey is: A) a waste of scarce time, money, and human resources; B) not likely to reflect any true state of gender bias; C) the product of an overreaction; and D) all of the above." 1036 (38 years old)

"I don't consider this a legitimate topic." 1091 (45 years old)

Many male attorneys do not observe or perceive gender bias in the judicial system.

"There are a handful of female attorneys with a political agenda and with large chips on their shoulders that appear to be most interested in misrepresenting the nature and extent of gender bias in the judicial system as I have experienced it. My experience is that there is little gender bias in the system, and to the extent there is, it is at a client level and is warranted based on the differences between males and females. For example, mothers generally (but not always) make better custodial parents for children.

¹ At least one male respondent appeared hostile to women attorneys themselves. "There should be NO women attorneys. They do their clients a disservice because of their lack of analytical skills and ability to negotiate. I have never heard a positive comment from another attorney when dealing with women." 1213 (no ge listed)

Fathers are most suited by circumstance to be required to pay child support and maintenance to an ex-spouse. Females tend to be more likely victims of male violence, etc." 1024

"As far as differences in treatment between male and female judges and lawyers amongst each other -- I simply do not see a difference in treatment between males and females based on gender. And I haven't from the time I first started practicing law. There are both highly qualified and professional female and male lawyers, as well as judges, and there are unprofessional male and female lawyers in my opinion." 1024 (38 years old)

"In my twelve-year career, I have never witnessed any behavior by any attorney or judge which was improper based on gender. In the heat of the moment, I may call another lawyer, a male, "a dickhead." Is that comment demonstrative of gender bias? I think not. Similarly, I have heard old-time lawyers call an attorney, a female, by the term "dear." Were those comments demonstrative of gender bias? Not coming from those attorneys, one of whom had hired two female associates. Those same guys called me "son." Age bias? Gender bias may exist, but I've never seen it practicing law. 1036 (38 years old)

"In my practice, I have not seen females attorneys treated poorly or with disrespect because of their gender." 1040 (49 years old)

"I honestly believe that the entire gender bias is essentially a non-issue. . . I do not deny that there was a great deal of gender bias expressed at the turn of the century when it was absolutely unheard of for women to be an attorney. However, at that same time, it was unheard of for a woman to be working in an office as a secretary, let alone in a business environment." 1056 (48 years old)

"As my answers reflect, I have not seen or been aware of women attorneys being abused in professional or court settings." 1065 (45 years old)

"I have seen no gender bias at any level or in any court or proceedings except one out-of-state federal judge and it was anti male." 1088 (71 years old)

"As the number of female attorneys has increased, so has the acceptance of their role in the profession. While in the 1960s, the law was perceived as a

profession for men, this is no longer true. Granted there may still be some older attorneys that long for the days when the law was a 'good old boys' club, but their view is held or shared by a very small minority - - perhaps 5-10 percent of all attorneys. . . . If gender bias exists in the law, it is for the most part inadvertent." 1128 (42 years old)

"In close to fifteen years of practice, I have seen very little gender bias in the legal profession. . . . I rarely observe obnoxious behavior based on gender." 1137 (40 years old)

"Perhaps my reaction is affected by the very little gender bias I have encountered against females." 1170 (no age listed)

"As an attorney with an active practice before the court, my experience has uniformly been that the bar and the bench show greater respect and deference to female attorneys, witnesses or parties than to male. I cannot recall a single incident that I would consider misconduct on the part of an attorney or judge toward a female attorney or party." 1216 (47 years old)

"In just fifteen years, gender bias has gone from fairly common to very uncommon, especially on the part of judges and court personnel. Based on what I see in my presence, I think it has largely disappeared. I think it is more of a perceived than real problem now. For example, if a male lawyer is belittling to a female lawyer in settlement negotiations, she often concludes it is gender bias. But the male lawyer probably acts the same way toward male adversaries. Often there is a failure to distinguish between chauvinist and garden-variety jerks." 1227 (44 years old)

Many male respondents believed that lawyers are less civil, less collegial, less professional to each other these days and that female lawyers often mistake "arrogant, discourteous, unpleasant, or obnoxious" behavior for gender-biased behavior.

"The major problem that I see is the lack of ethics and morality among the younger members of the bar -- both male and female. The entire practice of law has changed for the worse." 1063 (44 years old)

"On the questions related to rude or aggressive behavior, my experience is that if an attorney is a boor or an ass, they are an equal opportunity boor or ass, treating males and females alike, badly." 1182 (46 years old)

women

Some women lawyers have not observed or experienced gender bias; the majority of women lawyers responding to this survey have observed or experienced what they interpret as gender bias.

"I am a female. Generally I have not felt I have been discriminated against." 2008 (33 years old)

"I have never seen so much as a hint of gender bias by any of our judges -- District or JP." 2185 (45 years old)

"I strongly believe that skilled, competent counsel will get fair treatment whether by the court, the jury, other counsel, or court personnel -- regardless of gender. . . . I have never experienced any gender-based (or other kind, for that matter) mistreatment or lack of respect in any of the state, local or federal courts in which I have practiced . . ." 2166 (37 years old)

"My gender has been no impediment." 2114

"As an active woman attorney, I have found that my own attitude usually controls the attitude of those I work with professionally." 2023 (69 years old)

"It seems to me that we have all become overly sensitive and overly critical when it comes to dealing with both sexes." 2094 (34 years old)

"I have found my clients are more gender biased than the profession is." 2085 (51 years old)

"I have experienced as much harassment from other females (usually secretaries or office managers) as other male lawyers and the women are very direct ('Oh, are you really a lawyer?') versus a male just ignoring me as if I wasn't even there." 2233 (34 years old)

* * * * *

"I wish things were better, but in my ten years they seem to have gotten worse." 2011 (39 years old)

"Things haven't changed a whole lot in the last two decades. Women are routinely subject to sexual harassment and/or intimidation, in the legal profession and in the culture at large." 2019 (45 years old)

"I think there is a great deal of subtle sexism among male attorneys against female attorneys." 2032 (39 years old)

"In my thirteen years of active practice of law, I have become convinced that gender bias exists." 2078 (43 years old)

"While overt sex discrimination is not as prevalent any more, attitudes of gender bias still are." 2092 (38 years old)

"It is particularly disturbing that the male attorneys who are most accepting of women attorneys seem to be those over fifty, many of whom have grown daughters. Men in their thirties and forties are the ones most commonly exhibiting exclusionary behavior and overt gender discrimination." 2127 (38 years old)

"Judges and lawyers (male) are, in general, more receptive to female practitioners than they were ten to fifteen years ago. The overt signs of sex bias are mostly (not totally) gone. But I would say that most males still retain the essential attitude of gender bias." 2136 (42 years old)

"In the ten years I have been practicing, it seems as though gender bias has become less blatant, more subtle. It hasn't lessened any; it's just harder to tell a subtle incident than it is to tell a blatant incident. It's not getting any better." 2201 (41 years old)

Female respondents provided many examples of what they considered gender bias.

in the hiring process

"Of my graduating class, the top six graduates were women -- none of them received job offers in Missoula and most of them ended up with federal clerkships in which they either had to move or to commute." 2187

"My third year in law school, I interviewed with a well-known firm. The interview was lengthy and cordial. I was shocked when, at the end of the interview, one attorney said, 'You do understand that we may not hire anyone now because all of the applicants were women.'" 2199

in trying to combine lawyering and parenting

"One of my first job interviews, during my last year of law school, was for a judicial clerkship. I was about six-and-a-half months pregnant with my first child. The judge interviewing me told me I should not work if I was going to have a baby. Being an attorney, even a law clerk, he said, was too demanding to allow me to be a good parent." 2055

"As a senior in law school, I interviewed with a judge for a clerkship. This judge was known to be liberal and consistently hired female clerks. I asked to be considered for a clerkship to begin the following January, because I was having a baby in April. I was told that I should stay home with my baby. I pointed out that my child would be nine months old and was my second child." 2090

"Women, especially women with children, are shunted onto a non-partnership track with less pay and less prestige." 2020

"The uniform billable hour requirement makes very unequal demands on the person (generally a man) with a stay-at-home spouse or a spouse who works part-time and the person (generally a woman) who is a single parent or has primary child-raising responsibility. It does not allow the firm to value individuals and creates resentment between the lawyers in these different circumstances." 2127

in the assignment of legal work

"I have been assigned to read documents solely, even though I graduated at the top of my law school class and have been in practice ten years; men are invited to strategy sessions." 2011

"Women in my firm, associates and junior partners, are more likely to be asked to assist with research, brief-writing and pre-trial work, and are less likely to be assigned cases." 2127

in allowing or requesting female attorneys to travel

"Males associates are invited on business trips to meet people, whereas female associates are not." 2011

in client development

"Male associates and junior partners are invited by partners to participate in client development activities, like lunches, sporting events, service clubs. Women are less frequently invited and less frequently introduced to adjusters and established clients or to other attorneys and judges." 2127

in their lack of authority and credibility

"A competent and experienced female litigator who had skillfully prepared a significant wrongful death case for two years was pulled as trial counsel two weeks before trial because the client expressed unease at having a woman trying the case. A male attorney had to scramble to prepare, relying on her, of course, to bring him up to speed." 2127

"One district judge told me I had better consult with my male law partner; the judge disagreed with the position I took in a case." 2026

"Male attorneys frequently take over meetings with clients which they attend by constantly interrupting female attorneys or commonly by 'translating' what the woman says, repeating her remarks in slightly different words, as if he can give the message more credibility." 2127

in the terms used to refer to them

"The women in our office have been referred to as 'cupcake' or 'muffin.' A partner in my firm stated, about a temporary secretary, that he would like to see her 'naked on a palomino.'" 2011

in jokes

"The men in this office ridicule the women, tell sexist jokes, and call women derogatory and cruel names."
2014

in unwanted touching

"I have also experienced incidents where judges and hearing officers have patted me on the head, rubbed my shoulder in the elevator, referred to me as 'Kiddo,' and winked at me during law and motion." 2043

in the manner males lawyers interrupt female lawyers

"When another woman attorney and I are conferring, we are routinely interrupted by male attorneys, who often assume we are not talking about work. When I am conferring with a male attorney, that never happens."

2127

judicial avoidance

"I tried a two-day custody case in state district court (I represented the father). Opposing counsel repeatedly referred to me as 'young miss' or "Miss _____." He would race to my table and yell at me for interrupting him every time I made an objection. I kept looking to the judge for assistance, but he seemed to be amused by the other attorney. I was so disappointed in the judge for not admonishing the other attorney." 2070

in comments on female appearance

"The men in this office comment on women's appearance and whether that appearance will enhance business development." 2014

miscellaneous

"[M]ale attorneys who are difficult, demanding, or unfriendly are tolerated. Women who have the same qualities are described as bitches, radical feminists, suffering from PMS, or not getting enough sex. Likewise, any assertiveness or zealousness on behalf of a client is "bitchy." 2127

"There is a tremendous resistance to using gender-neutral language and suggesting it earns one ridicule." 2127

"Overt degrading and insulting remarks to and about women attorneys are tolerated within the office and in social settings with the attitude that it's 'just kidding,' and women who are offended are hypersensitive and not 'good sports.'" 2127

"I was in a large district courtroom shortly after the nomination of Ruth Ginsberg to the United States Supreme Court. In his 'opening remarks,' the judge asked me whether I thought Judge Ginsberg had any 'smarts' since she 'sure doesn't have any looks.'" 2027

family law

"As a family law attorney in the early 1980s, both I and my female clients faced significant discrimination in one state judge's court in family law matters. In one default divorce proceeding, the judge persisted in questioning my client about her reasons for wanting a divorce. She recounted efforts at reconciliation and told the judge that she did not love her husband. He persisted, asking her why she did not love her husband. At that point she answered that her reasons were personal. I objected to the relevance. The judge threw the file down, chastised me for not cooperating, and ordered us to chambers. Finally, in chambers, he was satisfied when she said her husband physically abused her. There were no children, there was no attempt at a TRO; this information was not relevant. This scene occurred immediately following another default divorce proceeding in which the male lawyer questioned his male client in perfunctory fashion, then, smiling at the judge, commented that this divorce was granted in record time." 2138

In another case, I represented a female client who was seeking to enforce a dissolution agreement provision which required that the ex-husband pay all closing costs if the family home sold after one year from the date of dissolution. The date of dissolution was June 16, and the house sold on June 21 the following year. Clearly, more than one year had passed. This same judge ruled against my client, on the absurd basis that one year should be rounded off to the nearest month, i.e., to July 1. My client could not afford to appeal, and I could not afford to represent her pro bono, so the ruling went unchallenged. This occurred after the above-described incident and, I think, was based on bias against me, not on any semblance of law." 2138

Discussion Questions for
Task Force Members

1. How should the Task Force respond to the "findings" that, in general, male attorneys do not observe gender bias (or interpret certain conduct as "sexist") or do not believe that certain conduct "is a form of gender bias that can adversely affect the outcome of the case and undermine counsel's credibility" (or both) but the majority of female respondents do?
2. Should the Task Force design specific recommendations to respond to each of the examples of gender bias listed in the comments of the survey? e.g., Should we recommend that senior attorneys invite female as well as male attorneys to travel on business? Should we recommend that trial or courtroom work be assigned to lawyers regardless of gender? Should we recommend that lawyers and judges try to refrain from using terms of endearment or affection (or condensation), e.g., honey or dear, when speaking to or about women attorneys? Should we recommend that judges admonish lawyers who display "sexist" conduct in court or in chambers? etc.
3. Survey respondents identified the area of family law as sorely in need of attention. Respondents reported that both lawyers and judges tried to avoid handling family law cases. Family law is identified as low prestige and emotionally difficult. In what creative ways might the Task Force respond?
4. Lots of gender bias task forces in other states have recommended "education." What are creative forms of educating lawyers and judges in Montana? For example, we could write or commission articles in the Montana Lawyer or in the Montana Law Review. We could make or commission videotapes to be distributed throughout the state (or played on television). We could ask for separate CLE presentations or for gender issues to be included in subject area CLEs. We could ask the law school to do "something" either for law students or the bar. QUESTION: Education assumes we know "the answer." But, I suspect, there is no answer, but rather a need for us to be able to speak to one another about these issues, respectfully and politely, to reach some understanding of the experiences and perceptions of others. How could the Task Force facilitate this?

